TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1914

No. [redacted]52

MARTHA ADKINS, PLAINTIFF IN ERROR,

vs.

HENRY C. ARNOLD AND JAKE F. ARNOLD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

FILED AUGUST 28, 1912.

(23,341)

(23,341)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 335.

MARTHA ADKINS, PLAINTIFF IN ERROR,

vs.

HENRY C. ARNOLD AND JAKE F. ARNOLD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 9, 1914.

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a *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Oklahoma, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the *the* complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Oklahoma, in Oklahoma City, Oklahoma, this 15" day of August, 1912.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of Oklahoma,
By JESSIE PARDOE, *Deputy.*

1 Filed Aug. 14, 1912. W. H. L. Campbell, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Henry C. Arnold and Jake F. Arnold, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of the State of Oklahoma wherein Martha Adkins is Plaintiff in Error and you are Defendants in Error, to show cause, if any there be, why the judgment rendered against said Plaintiff in Error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Samuel W. Hayes, Acting Chief Justice of the Supreme Court of the State of Oklahoma, this the 26th day of July, in the year of our Lord, one thousand nine hundred and twelve.

SAMUEL W. HAYES,
Acting Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

W. H. L. CAMPBELL,
Clerk of the Supreme Court, State of Oklahoma.
By JESSIE PARDOE, *Deputy.*

On the 12th day of August, in the year of our Lord, one Thousand nine Hundred and Twelve, personally appeared Lloyd Thomas, before me, the subscriber, C. M. Templeman, and makes oath that he delivered a true copy of the within citation to Jake F. Arnold,

the said Jake F. Arnold being thus served on the 9th day of August, 1912, as aforesaid.

LLOYD THOMAS.

Sworn to and subscribed on this 12th day of August, 1912.

[Seal of Chas. M. Templeman, Notary Public, Hughes County, Okla.]

CHAS. M. TEMPLEMAN.

My commission expires July 24, 1916.

1½ TULSA, OKLAHOMA, *August 2nd*, 1912.

I, O. A. Morton, counsel of record for the within named Henry C. Arnold, do hereby accept service of the within named citation for the said Henry C. Arnold, on this the 5th day of August, 1912.

O. A. MORTON,
Counsel for said Henry C. Arnold.

Return of service on Jake F. Arnold:

56 Miles, at 10 cts. per Mile	$5.60
1 Copy of Citation on Jake F. Arnold	.75
Total	$6.35

Paid by the Plaintiff in error.

LLOYD THOMAS.

Subscribed and sworn to before me on this the 12th day of August, 1912.

[Seal of Chas. M. Templeman, Notary Public, Hughes County, Okla.]

CHAS. M. TEMPLEMAN.
Notary Public in and for Hughes County, Oklahoma.

My commission expires July 24, 1916.

STATE OF OKLAHOMA,
County of Hughes, To-wit:

I, Lloyd Thomas, being duly sworn says that in the above cause of Martha Adkins vs. Henry C. Arnold and Jake F. Arnold, he was deputized by Samuel W. Hayes, acting chief justice of the Supreme Court of said state, to serve the citations therein issued upon said Henry C. Arnold and Jake F. Arnold, and that he served the said Jake F. Arnold as shown by the above return, but the attorney of record having accepted service for Henry C. Arnold, he did not serve him with copy of the citation.

LLOYD THOMAS.

Subscribed and sworn to before me on this the 12th day of August, 1912.

[Seal of Chas. M. Templeman, Notary Public, Hughes County, Okla.]

CHAS. M. TEMPLEMAN,
Notary Public in and for Hughes County, Oklahoma.

My commission expires July 24, 1916.

2 MARTHA ADKINS, Plaintiff in Error,

vs.

HENRY C. ARNOLD and JAKE F. ARNOLD, Defendants in Error.

To Loyd Thomas:

You are hereby deputized by me to serve the citations in the above entitled cause upon the defendants in error therein, Henry C. Arnold and Jake F. Arnold, and make due return thereon, as required by law, this the 26th day of July, 1912.

[Seal Supreme Court, State of Oklahoma.]

SAMUEL W. HAYES,
Acting Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:
W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma.
By JESSIE PARDOE, *Deputy.*

Filed Jul- 26, 1912.
W. H. L. CAMPBELL, *Clerk.*

3 In the Supreme Court of the State of Oklahoma. In Equity.

MARTHA ADKINS, Plaintiff in Error,

vs.

HENRY C. ARNOLD and JAKE F. ARNOLD, Defendants in Error.

To the Honorable John B. Turner, Chief Justice of the Supreme Court of the State of Oklahoma:

Comes now the plaintiff in error above named, Martha Adkins, and showeth unto this honorable court and said Chief Justice that in the record and proceedings, and rendition of the decree in the above styled cause by the Supreme Court of the State of Oklahoma, it being the highest court of said state in which a decision could be had on said suit between said Martha Adkins and Henry C. Arnold and Jake F. Arnold, manifest errors have occurred greatly to her injury and damage, whereby your petitioner feels aggrieved.

That in the record and proceedings, including the said decision of said Supreme Court, it will appear that there was drawn in question the construction of the laws of descent and distribution of the Creek Nation placed in force in said Creek Nation by an Act of the Congress of the United States, entitled "An act to ratify and confirm an agreement with the Muskogee or Creek tribe of Indians, and for other persons," approved by said Congress on the 1st day of March, 1901, and ratified by said Muskogee or Creek tribe of Indians, on the 25th day of May, 1901; and also the construction of section 1 of chapter 104 of Mansfield's Digest of the Statutes of Arkansas, which said chapter and numerous other chapter- of said digest of the Statutes of said state, were put in force in said Creek Nation and the Indian Territory, by another act of Congress, entitled, "An act to organize the Territory of Oklahoma; to establish courts in the Indian Territory, and for other purposes," approved on the 2nd day of May, 1890; and also the construction of another act of Congress, entitled "An Act Providing for record of deeds and other conveyances and instruments of writing in Indian Territory, and for other purposes," whereby chapter 27 of said Digest of the Statutes of Arkansas were placed in force in said Nation the Indian
4 Territory, the construction in said decision leading especially to sections 648 and 659 of said chapter 27, relating to the way and manner in which the lands of married women could be conveyed thereunder in said Indian Territory, at the time the lands in controversy in this case, were thus attempted to be convey-, and in which said decision said Supreme Court held, in the construction of said acts and sections, that "Under the laws in force in Indian Territory prior to statehood, a married woman could convey the title to her real estate, the same as if she were single; and where she joins her husband in a deed of her land, and also relinquishes dower, the deed will convey the fee, though she acknowledges only the *right* relinquishment of dower. (And that)

Section 648 and 659 of chapter 27 Mansfield's Digest of the laws of Arkansas, put in force in the Indian Territory by act of Congress of Feb'y 19, 1903, (32 U. S. Stat. L. 841) were, in so far as they affected the conveyance by a married woman of her land, inconsistent with section 4621, chapter 104, of Mansfield's Digest, which was in force prior thereto, and to the extent of such inconsistency said sections 648 and 659 were not in force in Indian Territory prior to statehood;" all of which is fully apparent in the record and proceedings of the case, and specifically set forth in the assignment of errors filed herewith.

Wherefore petitioner prays that her writ of error be allowed and that a transcript of the record, proceedings and papers upon which said decrees were made, duly authenticated, be ordered sent to the Supreme Court of the United States, at Washington, D. C., under the rules of said court in such cases made and provided, that the same may be inspected and corrected according to law and justice should be done.

LOUIS C. LAWSON,
Counsel for said Plaintiff in Error.

Filed Jul- 26, 1912.
W. H. L. CAMPBELL, *Clerk.*

5 In the Supreme Court of the State of Oklahoma.

MARTHA ADKINS, Plaintiff in Error.

vs.

HENRY C. ARNOLD and JAKE F. ARNOLD, Defendants in Error.

And now, before the justices of the Supreme Court of the United States of America, at the Capitol, in the city of Washington, comes Martha Adkins, plaintiff in error, by her counsel, in the above-styled case, and, assigning error therein, says: that in the record and proceedings in the aforesaid cause there is manifest error in this, to-wit:

That the Supreme Court of the State of Oklahoma erred in adjudging and deciding that "there is no charge of fraud, deceit or inadequacy of price made in this case;" that "Mrs. Adkins, the sole owner of the land, joins in the operative words of the grant, usually designated as the granting clause;" that "In the light of the Arkansas decisions, and in reason, we believe that the deed in this case was sufficient to pass title, as between the parties and their privies, although not acknowledged in such form as to entitle it to registration under the laws in force in Indian Territory. The plaintiff in this case was seeking to foreclose a mortgage given by the grantee of Mrs. Adkins, the deed being good between the grantor and grantee it was good as to the mortgagee. No other deed or subsequent conveyances are set up. We therefore believe the answer and cross petition of the defendant did not state a defense, a cause of action, or grounds for relief as sought, and that the demurrer to same was properly sustained and the judgment of the trial court should therefore be affirmed;" and that as shown in points 1 and 2 of the syllabus of the case "Under the laws in force in Indian Territory prior to statehood, a married woman could convey the title to her real estate, the same as if she was single; and where she joins her husband in a deed of her land, and also reliuquishing dower, the deed will convey the fee, though she acknowledges only the relinquishment of dower.

(2) Section- 648 and 659 of chapter 27 Mansfield's Digest of the laws of Arkansas, put in force in the Indian Territory by Act of Congress of Feb'y 19, 1903, (32 U. S. Stat. L. 341) were, in so far

6 as they affected the conveyance by a married woman of her lands, inconsistent with section 4621, chapter 104, of Mansfield's Digest, which was in force prior thereto, and to the extent of such inconsistency said sections 648 and 659 were not in force in Indian Territory prior to statehood;" and in holding and deciding that said deed mentioned in said case of said W. B. Adkins to said Jake F. Arnold for said lands of this plaintiff in error, dated the 15th day of January, 1907, and joined in by said plaintiff in error, relinquishing only her right of dower therein, and for that purpose alone, as alleged in her said answer and cross-petition, was good and passed the fee simple title to such lands of said plaintiff in error thereunder, and that said lands were thereby made subject to the said mortgage of said Henry C. Arnold and liable for its payment, as prayed for in his said petition.

Plaintiff in error says that in the aforesaid suit there was drawn in question the construction and determination of the laws of descent and distribution of the Creek Nation, put in force and effect in said Creek Nation by an act of Congress, entitled "An act to ratify and confirm an agreement with the Muskogee or Creek tribe of Indians, and for other purposes," passed by Congress on the 1st day of March, 1901, and ratified by said Muskogee or Creek tribe of Indians on the 25th of May, 1901; and also the construction, force and legal effect of section 1 of chapter 104 of Mansfield's Digest of the Statutes of Arkansas put in force in said Creek Nation and Indian Territory, by an act of Congress entitled "An act to organize the Territory of Oklahoma; to establish courts in Indian Territory, and for other purposes," passed by Congress on the 2nd day of May, 1890; and also the construction, force and effect of another act of Congress, entitled "An Act Providing for record of deeds and other conveyances and instruments of writing in Indian Territory, and for other purposes," whereby chapter 27 of said Statutes of Arkansas was put in force and effect throughout said Indian Territory, and passed on the 19th day of February, 1903, the construction thereof in said decision leading especially to sections 648 and 659 thereof, as compared and contrasted with said section 1 of said chapter 104 of said Statutes of Arkansas, and the latter section was thereby held to have been in full force and effect according to its own terms and provisions, at the time the deed for the lands in controversy was alleged to have been made, and nullified said sections 648 and 659, as to the
7 manner of sale and conveyance of married women then living and residing in said Indian Territory, in the disposition of their lands and real estate, and thereby denying to the plaintiff in error in said decision the legal effect, force and provisions of said chapter 27 of said Statutes, and especially the terms, provisions and legal efficacy of said sections 648 and 659 thereof; and that in said decision there was necessarily drawn in question section 1 of Article 14 of the Constitution of the United States, which declares that "no state shall make or enforce laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law," which said section and provision of said Constitution was necessarily drawn in question herein and decided against the right, title and interest of this plaintiff in error, in and to said lands in controversy, under and by reason of said deed therefor, in this, that, in her answer, and amended answers and cross-petitions filed in said cause, the plaintiff in error charged, in effect, that she had never made, executed or delivered said deed to said Jake F. Arnold; that she had never received any consideration whatever for said deed or lands, neither directly nor indirectly; and that she was then, and always had been since the same had been segregated, in the full possession and control of said lands, to which said answer and amended answers said defendant in error filed his demurrers, and the same went by default by said Jake F. Arnold, whereby said charges and allegations of said answer and amended answers were thus taken as true and correct, for all purposes of this suit; and under which conditions, no decree or decision herein could have

properly been rendered against the plaintiff in error and in favor of either of said defendants in error, whereby she could be deprived of said lands against her will and without just compensation.

Plaintiff in error further charges and avers that she is a Creek citizen and member of said Creek Nation, as shown by the record and proceedings in this case; and that she derived her right, title and estate in and to said lands in controversy under and by reason of said laws of descent of said Creek Nation, put in force in said Creek Nation by said act of Congress, aforesaid relating thereto, as as the sole and only heir of her deceased daughter Othelo; and that such right, title and estate was, and still is, protected by said acts and especially section 7 of said act of Congress and section 16 of
8 another act of Congress entitled "An act to ratify and confirm a supplemental agreement with the Creek Tribe of Indians, and for other purposes" passed on the 30th of June, 1902, whereby neither the allottees or their heirs were permitted to alienate their lands for a period of five years, and such period of five years had not expired on the 15th day of January, 1907, the date of said deed to said Jake F. Arnold for the lands in controversy, and said lands were on said date inalienable and said deed is null and void under the provisions of said sections.

Plaintiff in error further says that said decision and holding of said Supreme Court is repugnant to said acts of Congress and especially to said sections 7 of the Original Creek Treaty, section 16 of said Supplemental Creek Agreement, and Sections 648 and 659 of said chapter 27 of Mansfield's Digest of the Statutes of Arkansas, put in force in said Indian Territory on the 19th day of February, 1903, by said act of Congress whereby the lands of married women, situated in said Territory, could be conveyed only in the way and manner specifically provided for in said Chapter 27; and said decision is also repugnant to Section 1 of the 14th Amendment of the Constitution of the United States and section 7 of Art. 2 of the constitution of the State of Oklahoma, forbidding that any person be deprived of life, liberty or property without due process of law.

And said plaintiff in error maintains and presents that said decision and judgment of said Supreme Court of the State of Oklahoma is contrary to said respective acts of Congress and said 14th Amendment and State constitution as affirmed and thereby denies to said plaintiff in error her right, title, interest and estate in and to said lands, and the privileges and immunities, provided for guaranteed and protected in said several act of Congress, and that there are manifest errors in said decision, as shown by the record and proceedings therein, as follows:

First. Said court erred in holding and deciding that "There is no charge of fraud, deceit or inadequacy of price made in this case;" whereas the answer of the plaintiff in error herein charged that she had never received any consideration whatever for said lands and joined in said deed only for the purpose of alienating her dower therein, and was still and ever had been since their seggrega-
9 tion, and the peaceable and quiet possession of said lands, and to which said answer said defendant in error Henry C. Arnold interposed alone his respective demurrers, which thus admitted said

facts alleged in said answers, and said decision necessarily resulted in depriving the plaintiff in error of her rights and interest in said lands in violation of said Section 1 of said 14th Amendment to the Constitution of the United States, and Section 7 of Article 2 of the Constitution of said State of Oklahoma, which provides "No person shall be deprived of life, liberty or property, without due process of law."

Second. Said Supreme Court also erred in holding and deciding that the plaintiff in error, "the sole owner of the land, joined in the operative words of the grant, usually designated as the granting clause;" and that "In the light of the Arkansas decisions and in reason, we believe the deed in this case was sufficient to pass title, as between the parties and their privies, although not acknowledged in such form as to entitle it to registration under the laws enforced in Indian Territory," and that "The answer and cross petition of the defendant did not state a defense, cause of action, or grounds for relief as sought, and that the demurrer to the same was properly sustained and the judgment of the trial court should therefore be affirmed."

Third. The said Supreme Court erred in holding and determining that "Under the laws in force in Indian Territory prior to statehood, a married woman could convey the title to her real estate, the same as if she were single; and where she joins her husband in a deed for her land, and also relinquishes dower, the deed will convey the fee, though she acknowledges only the relinquishment of dower."

Fourth. The said Supreme Court erred in holding and deciding that "Sections 648 and 659 of Chapter 27 of Mansfield's Digest of the laws of Arkansas, put in force in the Indian Territory by act of Congress in Feb'y 19, 1903, (32 U. S. Stat. L. 841) were, in so far as they affect the conveyance by — married woman of her lands, inconsistent with Section 4621, Chapter 104 of Mansfield's Digest, which was in force prior thereto, and to the extent of such inconsistency said Sections 648 and 659 were not in force in Indian Territory prior to statehood."

Fifth. Said Supreme Court also erred in holding and deciding in said cause that "Under the laws in force in Indian Territory prior to statehood, a deed by a married woman of her lands wherein she joins her husband in the operative words of grant, but acknowledges relinquishment of dower only, is not sufficiently acknowledged to entitle it the record, but it is sufficient, as between the parties or privies to convey the fee."

Sixth. That said Supreme Court erred in holding and deciding that the alleged deed purporting to have been made, on the 15th day of Janurary, 1907, by W. B. Adkins to Jake F. Arnold for the lands in controversy, and joined therein by the plaintiff in error to relinquish her right of dower only to said lands, conveyed the fee simple title thereto and thereby deprived the plaintiff in error of all her right, title and interest in said land, 1st, because said deed was embodied in the answer and cross petition of the plaintiff in error, and shows up on its face that it purports to have been made and executed on the 15th day of Janurary 1907, which fact discloses that the

same was so made within the five years' restrictive period as provided in said section 7 of the Original Creek Treaty and Section 16 of said Supplemental Creek Treaty, and the plaintiff in error being a Creek citizen and receiving said lands under said treaty the said deed was therefore null and void; 2nd because said deed shows upon its face that it was not made and executed by said plaintiff in error in the way and manner provided for in said Chapter 27 of Mansfield's Degest of the Statutes of Arkansas, and especiall- Section- 648 and 659 thereof, and said deed is therefore absolutely null and void; and 3d, because it is charged and averred in the answers and cross petitions of said plaintiff in error in effect that she never made, executed or delivered said deed to said Jake F. Arnold; that she joined in the same only for the purpose of alienating her right of dower in said lands; that she never at any time, place or condition, neither directly or indirectly, received and consideration whatever for said lands under said deed, or by reason thereof or otherwise; and that at the time of filing said answer, and at all other times since said lands had been segregated, plaintiff in error was in pos-
11 session of these lands and claiming the same as and for her own in fee simple; and that said decision of said court is in violation of the rights and interest of the plaintiff in error in and to said lands and denies to her the protection and validity of said acts of Congress and Sections herein referred to, in this, that said facts set up in said answer and cross petition being taken as true upon said demurrer thereto the said decision of said court results in thus depriving the plaintiff in error of all her right, title and interest in said land, without any compensation whatever, and without ever having delivered said deed to said Jake F. Arnold or the possession of said lands thereunder to him or any one else, but simply because the plaintiff in error signed said deed for the purpose alone of alienating her right of dower therein; and which said decision plaintiff in error respectfully submits is not only in violation of said acts of Congress and sections above referred to but denies the validity of their existance as applicable to the merits of this case and denies to the plaintiff in error the legal force and effect of the same, and deprives the plaintiff in error of her right of property herein without due process of law, as guaranteed to her by said Section 1 of the 14th Amendment to the Constitution of the United States and Section 7 of Article 2 of the Constitution of the State of Oklahoma.

Wherefore said plaintiff in error prays that said judgment and decision aforesaid may be reversed, annul-ed, and altogether held for naught, and that she may be restored to all things which she has lost by this action and because of said judgment and decision; and that she may have such other and further relief herein as may be proper and just.

Dated this the 23d day of July 1912.

LEWIS C. LAWSON,
Counsel for Plaintiff in Error,
Holdenville, Oklahoma.

Filed Jul- 26, 1912.
W. H. L. CAMPBELL, *Clerk.*

12 In the Supreme Court of the State of Oklahoma.

MARTHA ADKINS, Plaintiff in Error,

vs.

HENRY C. ARNOLD and JAKE F. ARNOLD, Defendants in Error.

On this the 24th day of July, 1912, came on to be heard the application of Martha Adkins, the plaintiff in error, said plaintiff being represented by counsel, for a writ of error, and it appearing from the petition filed herein, and the record filed therewith that the application ought to be granted and that a transcript of the record and proceedings and papers upon which the judgment of the court was rendered, pr-perly certified, should be sent to the Supreme Court of the United States, properly certified as the law directs, that said court may inspect the same and do what according to law should be done.

It is therefore ordered that the writ of error be allowed upon the said plaintiff in error giving bond, conditioned as the law directs, in the sum of $1,000.00 which shall operate as a supercedeas in said case; and that a true copy of the record, assignment of errors and all proceedings has in the case in the Supreme Court of the State of Oklahoma shall be transmitted to the Supreme Court of the United States, pr-perly certified as the law directs that said court may inspect the same and do therein what the law and justice may require.

[Seal Supreme Court, State of Oklahoma.]

SAMUEL W. HAYES,
Acting Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:
W. H. L. CAMPBELL, *Clerk*,
By JESSIE PARDOE, *Deputy*.

Filed Jul- 26, 1912.
W. H. L. CAMPBELL, *Clerk*.

13 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the said State of Oklahoma before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Martha Adkins, plaintiff in error, and Henry C. Arnold and Jake F. Arnold, defendants in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the

ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction
14 of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Martha Adkins as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 25th day of July, in the year of our Lord one thousand nine hundred and twelve.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the District Court of the United States for the Western District of Oklahoma.

Allowed by
SAMUEL W. HAYES,
Acting Chief Justice, Supreme Court of State of Oklahoma.

[Endorsed:] Filed Jul- 26, 1912. W. H. L. Campbell, Clerk.

15 Know all Men by these Presents, That we, Martha Adkins, as principal, and —— ——, —— ——, as sureties, are held and firmly bound unto Henry C. Arnold and to Jake F. Arnold in the full and just sum of One Thousand dollars, to be paid to the said Henry C. Arnold and Jake F. Arnold, — certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this Twenty two day of July, in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately at a term of the Supreme Court of the State of Oklahoma in a suit depending in said Court, between said Martha Adkins as plaintiff in error, and said Henry C. Arnold and Jake F. Arnold as defendants in error therein a decision by said Supreme Court was rendered against the said Martha Adkins and in favor of

said Henry C. Arnold and Jake F. Arnold and the said having obtained a writ of error filed a copy thereof in the Clerk's Office of the said Court to reverse the decision in the aforesaid suit, and a citation directed to the said Henry C. Arnold and Jake F. Arnold citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within — days from the date thereof.

Now, the condition of the above obligation is such, That if the said Martha Adkins shall prosecute her writ of error to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

MARTHA J. ADKINS. [SEAL.]
NICHOLAS V. BILBY. [SEAL.]
WALTER E. TEMPLEMON. [SEAL.]

Sealed and delivered in presence of—
—— ——.

Approved by—
SAMUEL W. HAYES,
Acting Chief Justice Supreme Court of State of Oklahoma.

[Endorsed:] Filed Jul- 26, 1912. W. H. L. Campbell, Clerk.

16 MARTHA ADKINS, Plaintiff in Error,
vs.
HENRY C. ARNOLD and JAKE F. ARNOLD, Defendants in Error.

Nicholas V. Bilby and Walter E. Templemon, being first duly sworn state that they have this day *gone* an appeal bond in the above style- *to* cause to the Supreme Court of the United States as the surety for said Martha J. Adkins upon said bond in the penal sum of $1,000; and that they are each worth the sum of $1,000 over and above all their debts, liabilities and exemptions under the laws of the State of Oklahoma.

NICHOLAS V. BILBY.
WALTER E. TEMPLEMON.

Taken subscribed and sworn to before me on this the twenty second day of July, 1912.

[Seal J. J. Kinney, Notary Public, Hughes County, Okla.]

J. J. KINNEY,
Notary Public in and for Hughes County, State of Oklahoma.

My commission expires 11-27-15.

Filed Jul- 26, 1912. W. H. L. Campbell, Clerk.

17 *Petition in Error in the Supreme Court of the State of Oklahoma.*

No. 1228.

MARTHA ADKINS, Plaintiff in Error,
vs.
HENRY C. ARNOLD and JAKE F. ARNOLD, Defendants in Error.

The plaintiff in error, Martha Adkins, charges and avers that she is a member of the Creek tribe of Indians and a citizen thereof and as such received her due proportion of the lands of said nation; that long years ago she was married to the defendant, W. B. Adkins, a non-citizen of said tribe and nation, and ever since has lived and cohabited with said Adkins as his lawfully wedded wife; that of said marriage with said Adkins, there was born to them one child named Otheola Adkins; that said child was a daughter and was and still is the only child born of said marriage; that said daughter was duly enrolled as a member of said Nation and thereafter received her allotment, comprising one hundred and sixty acres, situated in what is now Hughes county, Oklahoma; that while a mere infant said daughter died on the — day of November, 1901, intestate, and without issue or descendants, leaving her surviving plaintiff in error and her father, said W. B. Adkins; that upon her death, plaintiff in error became the sole and only heir to said lands, and thereby became the owner thereof in fee simple, according to the laws of descent and distribution of said Creek Nation, which laws are presented in the amended answer of plaintiff in error, as shown on page 18 of the record; and that plaintiff in error is now, and ever since said allotment has been, in the actual possession and control of said lands in controversy in this suit, and claims the same as and for her own in fee simple, as shown in said answer and amended answers filed in this suit.

Plaintiff in error further show- that on the 15th day of January, 1907, said W. B. Adkins undertook to sell and convey to said Jake F. Arnold said other defendant herein, a part of said lands thus allotted to said deceased daughter, comprising the north half of the south east quarter of section thirteen, township eight north, range nine east, for the pretended consideration of fifteen hundred dollars, and on said date executed a deed of conveyance to said Arnold for said lands above described, in which plaintiff in error joined simply

18 alienating her right of dower therein, as evidenced by a true copy thereof fully set forth in said amended answer filed in said cause, as shown on page- 20 & 21 of said record; that thereafter said Arnold seems to have executed to said defendant in error Henry C. Arnold a mortgage upon said lands described in said deed, together with other property to secure said defendant in error the payment of a note for $2,090.00, a copy of which is claimed in the petition of said defendant in error, to be filed therewith as exhibit "A," but which in fact was never filed or proven, and is not

now in said record, nor was said mortgage ever presented, proven or copy thereof filed in said cause; that on the 11th day of May, 1908, said defendant in error filed suit in the district court of Hughes County, Oklahoma, to collect said note and to foreclose said mortgage, against said Arnold, W. B. Atkins, Richardson Dry Goods Co. and plaintiff in error, without setting out what right, title or interest plaintiff in error had in said land, as shown on pages 1 & 2 of said record; to this petition, plaintiff in error filed her answer denying each and singular the material allegations in said petition and set up her cross-petition therein asserting her rights and interests in said lands in controversy, as shown on pages 8, 9 and 10 of said record, and thereafter on the 7th day of April, 1908, by leave of the court, plaintiff in error filed her amended answer to said petition denying each and every material allegation of said petition and again setting up her legal rights and interests in said lands, setting out the laws of des-ent and distribution of the Creek Nation, and a copy of said deed from said W. B. Adkins to said Arnold in haec verba, as shown on pages 16 to 24 of said record; that on the 8th of April, 1909, defendant in error demurred to said amended answer, on the ground that said amended answer does not state facts sufficient to constitute a defense to plaintiff's petition or any part thereof, or sufficient to entitle plaintiff in error to affirmative relief prayed therein, as may be seen on page 24 of said record; that on the 20th day of July, 1909, the court sustained said demurrer of said defendant in error, to which action of the court in sustaining said demurrer, plaintiff in error excepted, whereupon plaintiff was given leave to amend her said answer again, by alleging that she had never received any of the proceeds of said sale to said Arnold, as may be seen on page 39 of said record; that on the 21st day of July, 1909, plaintiff in error filed her second amended answer to said petition in conformity to said order of the court, as shown on page 25 of said record, to which defendant in error again demurred on the ground "that same does not set up any defense to this
19 action, nor does it set up any cause of action by way of cross complaint or cross bill against the plaintiff," as shown on page 27 of said record; that on the 24th day of July, 1909, the court again sustained said last demurrer to which action thereof the plaintiff in error excepted, as shown on page 40, and then and there filed a written motion, asking the court to suspend further action in said cause preparatory to plaintiff in error taking an appeal from the decisions of said court on said demurrers, as shown on page 28 of the record, and thereupon the case, without acting upon said motion, went over to September term, for further consideration, as shown on page 40 of said record; that defendant in error also demurred to the original answer and cross petition of plaintiff in error and the court sustained the same on the 6th day of April, 1909, as shown on page 34 to which plaintiff in error duly excepted.

Plaintiff in error further charges and avers that verification of said amended answers was waived as shown on said first amended answer and a court entry thereof as to the second, shown on page 39; that on the 27th day of July, 1909, defendant in error Henry C. Arnold

moved the court for judgment against plaintiff in error "on the pleadings of plaintiff and defendant Martha Adkins filed herein" see page 29; and on the 25th day of September, 1909, said motion of defendant in error was sustained and an entry made in said case overruling said motion of plaintiff in error to suspend further action therein as aforesaid, and at the same time, to-wit: the 25th day of September, 1909, said court entered up a decree in said cause upon said motion for judgment in favor of said defendant in error and against this plaintiff in error, holding and decreeing "that said Martha Adkins has no interest in and to said lands described in her answer and cross-petition, to-wit: the north half of the southeast quarter of section 13, Township 8 North, Range 9 east, Hughes County, Oklahoma"; and further decreed the sale of said lands to satisfy said note and mortgage, as shown on page 42 of said record, to all of which plaintiff in error again excepted, as shown on said page; and on said day, plaintiff in error filed her written motion for a new trial on said cause for reasons therein assigned, which said motion the court overruled and plaintiff in error again excepted, as shown on pages 42 and 43; while said motion for a new trial is shown on pages 30 and 31 of the record, together with the several assignments of error therein contained, all of which appear from the transcript of the record in said case hereto attached.

Plaintiff in error charges that there are errors in said proceedings, judgments and decrees, and assigns errors therein as follows:

First. In overruling plaintiff in error's motion for a new trial in this cause for the reasons therein assigned.

Second. In sustaining said defendant in error's demurrer to said original answer and cross-petition, her amended answer and cross-petition and her second amended answer of plaintiff in error, because said answers and cross-petitions show that unquestionably plaintiff in error was the legal owner of said lands therein mentioned and the only heir of said Otheola Adkins, the deceased daughter to whom said lands belonged or on account of whom said lands were thus allotted; and said deed to said Arnold did not pass the legal title thereto but left it remaining in plaintiff in error.

Third. In overruling the motion of plaintiff in error to suspend further proceedings therein after sustaining said demurrers, preparatory to taking an appeal therefrom before taking a final decree in said cause.

Fourth. In sustaining said motion of defendant in error for judgment in said cause on the pleadings therein without taking testimony or proof of the charge and allegations of said petition of defendant in error, after the same, and each of them, had been positively denied in said several answers and cross-petitions of plaintiff in error, and always thereafter insisted upon. The pleadings as they stood at the time of said motion and decree thereon was a complete bar to any recovery by defendant in error, unless established by competent proof of the allegations contained in said petition.

Fifth. In rendering the final decree therein upon said motion for said judgment whereby the court held and decreed "that (plaintiff

in error) said Martha Adkins has no interest in and to said lands described in her answer and cross-petition, to-wit: the north half of the southeast quarter of section 13, Township 8 north, range 9 east, Hughes county, Oklahoma," and in decreeing said
21 lands to be sold to satisfy the note therein mentioned, and foreclosing said mortgage upon said lands, as made and provided in said final decree thereon, in favor of said defendant in error Henry C. Arnold and against this plaintiff in error, thus inferentially holding and decreeing either that plaintiff in error was not the heir of said deceased daughter and, therefore, not entitled to said lands in any event, or that said deed to said Arnold conveyed her interest therein, thus enlarging the alienation of dower therein into a fee simple title to said lands contrary to the law governing this case.

Wherefore, plaintiff in error prays that said decree herein rendered be set aside and reversed by this honorable court and said lands be decreed to the plaintiff in error with her proper costs herein.

November 20th, 1909.

LEWIS C. LAWSON,
CRUMP, ROGERS & HARRIS,
Counsel for Plaintiff in Error.

(Endorsed:) Martha Adkins, Plaintiff in Error, vs. Henry C. Arnold and Jake F. Arnold, Defendants in Error. Petition in Error.

22 In the Hughes County District Court.

No. 128.

HENRY C. ARNOLD, Plaintiff,
vs.
JAKE F. ARNOLD et al.

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23 *Petition.*

In the District Court in and for Hughes County, Oklahoma.

HENRY C. ARNOLD, Plaintiff,
vs.
JAKE F. ARNOLD, MARTHA ADKINS, W. B. ADKINS, and THE RICHARDSON DRY GOODS CO., a Corporation, Defendants.

Petition.

Comes now the plaintiff in the above entitled cause and complains of the defendants and alleges:

1st. That the defendant, the Richardson Dry Goods Company, is a Foreign Corporation, doing business in the City of St. Joseph, in the State of Missouri, and the defendants, Jacket Arnold, Martha Adkins, and W. B. Adkins, are residents of Hughes County, Oklahoma.

2nd. That the defendant Jake F. Arnold is indebted to this plaintiff in the sum of Two Thousand and Nin-ty ($2,090.00) Dollars, which sum plaintiff claims with interest at the rate of ten per cent per annum from the 11th day of November, 1907, on a certain promissory note, a copy of which is hereto attached, marked exhibit "A" and made a part hereof.

3rd. That at the — of the delivery of the said note and to secure the payment of the said principal sum and the interest thereon as mentioned in the said note, according to the tenor thereof, the said defendant Jake F. Arnold duly executed under his hand and seal and delivered to this plaintiff his Mortgage Deed, bearing date of February 23rd, 1907, conveying the following described property, situated within the County of Hughes and State of Oklahoma, towit:

Lot # 2 in Block # 19 and Lot # 4 in Block # 20, in the Town of Yeager. And the North Half of the Southeast Quarter of Section Thirteen (13) in Twp. 8 N. and Range 9 E., together with all improvements located thereon.

24 4th. That the said mortgage was duly acknowledged on the 23rd day of February, 1907, and recorded in Book 18, at page 30, in the office of the Clerk of the United States Court and Ex-officio Recorder at Wewoka, Indian Territory, on the 26th day of February, 1907.

5th. That this plaintiff is the owner of the said note and mortgage, and the same is now past due and wholly unpaid.

6th. That the said defendants, Martha Adkins, W. O. Adkins and the Richardson Dry Goods Company, have or claim to have some interest in or lien on the said mortgaged premises, which, if any, accrued since the lien of the said mortgage.

Wherefore this plaintiff prays judgment against the said defendant Jake F. Arnold for the sum of Two Thousand and Nin-ty ($2,090) Dollars with interest at the rate of 10 per cent per annum from the 11th day of November, and for his cost; that a decree be

made and entered by this honorable court, directing the sale of the said mortgaged premises according to law, and that the proceeds thereof be applied in payment of the amount due this plaintiff; that the said defendants Martha Adkins, W. B. Adkins and the Richardson Dry Goods Company, and all persons claiming under them or either of them subsequent to the execution of the said mortgage upon the said premises, either as purchasers, incumbrancers or otherwise, may be forever barred and foreclosed of all right, claim or equity of redemption in the said property and every part thereof; and that the said defendant Jake F. Arnold may be adjudged to pay any deficiency which may remain after applying all of the proceeds of the sale of the sale premises properly applicable to the satisfaction of the said judgment.

(Signed) O. A. MORTEN,
Attorney for Plaintiff.

STATE OF OKLAHOMA,
County of Hughes, ss:

I, H. C. Arnold, being first duly sworn, deposes and says,
25 That I am the plaintiff in the above entitled cause, and that I have read the above and foregoing petition, and that the statements contained therein are true as I verily believe.

(Signed) H. C. ARNOLD.

Subscribed and sworn to before me this the 11th day of May, 1908.

(Signed) E. F. MESSENGER,
[SEAL.] *Clerk District Court.*

(Endorsement:) "No. 128. H. C. Arnold, Pl'ff, vs. Jacket Arnold, Martha Adkins, W. B. Adkins and the Richardson Dry Goods Company, a Corporation, Def'ts. Petition. Filed May 11, 1908. E. F. Messenger, Clerk District Court, Hughes County, Okla. O. A. Morten, Att'y for Pl't'f, Weleetka, Okla."

26 *Præcipe for Summons.*

STATE OF OKLAHOMA,
Hughes County:

In District Court.

HENRY C. ARNOLD, Pl't'f,
vs.
JAKE F. ARNOLD, MARTHA ADKINS, W. B. ADKINS, and THE RICHARDSON DRY GOODS CO., D'f'ts.

Præcipe for Summons.

To the Clerk of the said Court of Hughes County:

Please issue a Summons in the above entitled cause to Jake F. Arnold, Martha Adkins and W. B. Adkins, of Hughes County,

making same returnable on the 21st day of Nov., 1907, and designate therein the 10th day of June, 1908, as answer day, and deliver the same to the Sheriff of Hughes County, and indorse thereon, that if defendant- fails to answer, judgment will be taken for $2,090.00. with interest thereon from the 11th day of May, 1907, at the rate of 10 per cent per annum, and for foreclosure of mortgage described in petition.

(Signed) O. A. MORTEN,
Attorney for Plaintiff.

(Endorsement:) "No. —. In District Court. Præcipe for Summons. Henry C. Arnold vs. Jake F. Arnold, Martha Adkins, W. B. Adkins and The Richardson Dry Goods Co., Defendant-. Filed May 11, 1908. E. F. Messenger, Clerk District Court, Hughes County Okla."

27

Summons.

STATE OF OKLAHOMA,
Hughes County:

In District Court.

No. 128.

HENRY C. ARNOLD, Plaintiff,
vs.
JAKE F. ARNOLD, MARTHA ADKINS, W. B. ADKINS, and THE RICHARDSON DRY GOODS COMPANY, Defendants.

The State of Oklahoma to the Sheriff of Hughes County, Greeting:

You are hereby commanded to notify Jake F. Arnold, Martha Adkins, W. B. Adkins, that they have been sued by Henry C. Arnold, in the District Court of Hughes County, Oklahoma, and that they must answer the petition of said Henry C. Arnold filed against them in said Court, in the City of Holdenville, in said County, on or before the 10th day of June, 1908, or said petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 21st day of May, A. D. 1908.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Holdenville, in said County, this 11th day of May, A. D. 1908.

[SEAL.] (Signed) E. F. MESSENGER, *Clerk.*

(*Sheriff's Return Endorsed on Back of Summons.*)

Received this writ on 11th May, 1908, at 11 o'clock a. m. and served the same upon the following persons, defendants, within named, at the times following, to-wit: Jake F. Arnold, on 16 day May, at 2 o'clock p. m. 1908; W. B. Adkins, on 16th day of May,

at 2:30 p. m. 1908; By delivering a copy of the within summons for Martha Adkins to W. B. Adkins to deliver to her on 16th May, 1908, by delivering to each of said defendants, personally, in said county,
a true and certified copy of the within summons, with all
28 the endorsements thereon.

JAMES K. KING, *Sheriff*,
By LLOYD THOMAS,
Undersheriff.

Sheriff's Fees:

Service and return, 1st person	.50
Serving 2 additional persons	.50
3 copies summons	.75
Total	1.75

(Endorsement:) Suit brought for Foreclosure of Mortgage. If the defendant fail to answer, plaintiff will take judgment for the sum of $2,090, with interest thereon at the rate of 10 per cent per annum from the 11th day of Nov. 1907, and cost of suit. (Signed) E. F. Messenger District Clerk.

(Endorsement) Original. No. 128. App. Docket One, page 128. In District Court. Summons. Henry C. Arnold, vs. Jake F. Arnold, Martha Adkins, W. B. Adkins, and the Richardson Dry Goods Co. Issued May 11, 1908. Returnable May 21, 1908. Ans. Due June 10, 1908. Filed May 16, 1908. E. F. Messenger, Clerk District Court Hughes Co., Okla.

29 *Præcipe for Summons.*

STATE OF OKLAHOMA,
Hughes County:

In District Court.

HENRY C. ARNOLD
vs.
JAKE F. ARNOLD, MARTHA ADKINS, W. B. ADKINS, and THE RICHARDSON DRY GOODS CO., Defendants.

Præcipe for Summons.

To the Clerk of the said Court of Hughes County:

Please issue a summons in the above entitled cause to the Richardson Dry Goods Company, of St. Joseph, Missouri, and mail same to R. N. McConnell of Oklahoma City, Okla., making same returnable on the 21st day of May, 1908, and designate therein the 10th day of June, 1908, as answer day, and deliver the same to the Sheriff of Oklahoma County and endorse thereon that if defendant fails to answer, judgment will be taken for $2090.00 with interest thereon

from the 11th day of Nov., 1907, at the rate of 10 per cent per annum, and for foreclosure of mortgage described in petition.

(Signed) O. A. MORTEN,
Attorney for Plaintiff.

(Endorsement:) No. —. In District Court. Precipe for Summons. Henry C. Arnold, Plaintiff, vs. Jake F. Arnold, Martha Adkins, W. B. Adkins, and the Richardson Dry Goods Co., Defendant-. Filed May 11, 1908. E. F. Messenger, Clerk District Court, Hughes Co., Okla.

30

Separate Answer.

In the District Court in and for Hughes County, State of Oklahoma, at Holdenville.

HENRY C. ARNOLD, Plaintiff,
vs.
JAKE ARNOLD, MARTHA ADKINS, W. B. ADKINS, and RICHARDSON DRY GOODS CO., a Corporation, Defendants.

Now comes Martha Adkins, one of the defendants in the above cause, and for her separate answer to the petition of the plaintiff Henry C. Arnold, filed herein, denies each and singular the material allegations alleged therein.

Premises considered defendant therefore prays that the plaintiff Henry C. Arnold take nothing herein, that his petition be dismissed at cost of the plaintiff and for all proper relief.

Cross-petition.

Now comes Martha Adkins, and for her Cross-Petition herein against the Plaintiff, Henry C. Arnold, charges and states:

That she is a Creek citizen by blood, that Otheola Adkins is her minor daughter who died on the — day of ——, 190–, while the Creek Law of Descent and Distribution was in force in the Indian Territory prior to the 16th day of November, 1907, while the Arkansas law was in force in this part of the State.

That at the time of the death of said Otheola Adkins, she had no brothers nor sister, and leaving her only heir at law which is this defendant the mother of the said Otheola Adkins, that the father of the said Otheola Adkins is W. B. Adkins, a non-citizen of the Creek Nation.

That this defendant is the owner of the North half of the Southeast Quarter of Section Thirteen Township 8 Range 9, together with all the improvements thereon.

31 That as to the Lot No. 2 in Block No. 19 and Lot 4 in Block No. 20, in the Town of Yeager, Okla., this defendant has not interest therein, and never claimed to have, and no deed or

conveyance was ever executed to this defendant or by her touching the title to same.

That as to the mortgage referred to by plaintiff in his petition upon the land in controversy this defendant did not sign, execute or deliver to the plaintiff, and knows nothing regarding same.

That the note referred to by plaintiff in his petition this defendant did not sign and knows nothing regarding same.

Plaintiff further states that on the — day of ——, 190–, the defendant W. B. Adkins, made and delivered to the said Jake Arnold, his certain warranty deed, pretending to convey to the said Jake Arnold the North ½ of the S. E. ¼ of Sec. 13, Township 8, Range 9, in Hughes County, State of Oklahoma, and that this defendant signed said deed as the wife of the said W. B. Adkins for the purpose of relinquishing her dower to same, and that in fact the said W. B. Adkins did not own said land, and that this defendant had no dower therein to relinquish, and that said deed is now on record in Wewoka, Oklahoma, having been recorded before the 16th day of Nov. 1907, under the laws that *was* in force at that time, and a copy of said deed is hereto attached marked "A" and ask- to be made a part of this Cross-Petition.

Defendant further states that said deed is a cloud upon her title to the North ½ of the S. E. ¼ of Sec. 13, Town. 8, Range 9, in Hughes County, State of Oklahoma, and that she asks that the same be cancelled, set aside and held for naught.

Premises considered, defendant therefore prays that she be awarded her cost against the plaintiff with reference to the town lots in Yeager, Oklahoma, that the deed executed by W. B. Adkins, in which she relinquished her dower be cancelled, declared void, and
32 for all proper relief.

—— ——,
Attorneys for Defendant.

Martha Adkins, being duly sworn, upon oath states that she is *of* of the defendants in the above entitled cause and that she has read the foregoing answer and cross-petition and that the facts stated therein are true.

(Signed) MARTHA J. ADKINS.

Subscribed and sworn to before me this — day of May, 1908.

[SEAL.] (Signed) MACK COSAR,
Notary Public.

My commission expires 6/28-1911

Endorsement: No. 128. Henry C. Arnold, vs. Martha Adkins, et al. Separate Answer Filed June 1, 1908. E. T. Messenger. Crump, Rogers & Harris, Attorneys for Defendant.

33

Separate Answer.

In the District Court in and for Hughes County, State of Oklahoma, at Holdenville.

HENRY C. ARNOLD, Plaintiff,
vs.
JAKE ARNOLD, MARTHA ADKINS, W. B. ADKINS, and RICHARDSON DRY GOODS CO., a Corporation, Defendants.

Answer.

Now comes W. B. Adkins, one of the defendants in the above cause, and for his separate answer to the petition filed herein against him, denies each and singular the allegations alleged in said petition.

Defendant further states that he does not now and never did own the land described in said petition, and that he has no interest in said land and never did have any interest therein.

Premises considered defendant prays that the plaintiff take nothing herein that he have judgment for cost and for all proper relief.

(Signed) CRUMP, ROGERS & HARRIS,
Attorneys for Defendant.

No. 128, Henry C. Arnold vs. W. B. Adkins, et al. Separate Answer. Filed June 1, 1908. E. F. Messenger, Clerk District Court Hughes Co., Okla. Crump, Rogers & Harris, Att'ys for Defendant.

34

Affidavit.

In the District Court in and for Hughes County, Oklahoma.

HENRY C. ARNOLD, Plaintiff,
vs.
JACKE[illegible] ARNOLD, MARTHA ADKINS, W. B. ADKINS, and THE RICHARDSON DRY GOODS CO., a Corporation, Defendants.

Affidavit.

I, Henry C. Arnold, upon oath state that I am the plaintiff in the above entitled cause; that said cause is brought to foreclose a mortgage; that petition in said cause was filed in the District Court, in and for Hughes County, Okla., on the 11th day of May, 1908.

That Defendant, the Richardson Dry Goods Co., is a non-resident corporation, and personal services cannot be had upon it within this state.

(Signed) HENRY C. ARNOLD.

Subscribed and sworn to before me this 1 day of June, 1908.

(Signed) W. R. BARNEY,
[SEAL.] *Notary Public.*

(Endorsement:) No. 128. H. C. Arnold, plft. vs. Jake F. Arnold, et al. Affidavit. Filed June 2, 1908. E. F. Messenger, Clerk District Court, Hughes Co., Okla. O. A. Morton, Att'y for pl't'ff, Weleetka.

35 *Notice for Publication.*

STATE OF OKLAHOMA,
Hughes County, ss:

In District Court.

No. 128.

H. C. ARNOLD, Plaintiff.
vs.
JAKE F. ARNOLD, MARTHA ADKINS, W. B. ADKINS, and THE RICHARDSON DRY GOODS COMPANY, a Corporation, Defendants.

Notice for Publication.

Said defendant, The Richardson Dry Goods Company, a corporation, will take notice that it has been sued in the above named Court for foreclosure of all right, claim or equity of redemption in Lots No. 2, Block No. 19, and Lot No. 4, Block No. 20, in Town of Yeager, and N. ½ of S. E. ¼ of Sec. 13, T. 8 N., R. 9 E. by the plaintiff H. C. Arnold, and must answer the petition filed therein by said plaintiff on or before the 25th day of July, A. D. 1909, or said petition will be taken as true, and a judgment for said plaintiff in said action for foreclosure of m't'g's on above described property in the sum of $2,090.00 and interest and costs, will be rendered accordingly.

Dated this 6th day of June, A. D. 1908.

O. A. MORTON,
Attorney for Plaintiff.

Attest:
[SEAL.] E. F. MESSENGER,
District Clerk.

(Endorsement:) No. 128. In District Court. Notice for Publication. (for printer.) H. C. Arnold, Plaintiff, vs. Jake F. Arnold, et al., Defendant-. Filed June 6, 1908. E. F. Messenger, District Clerk.

36 *Proof of Publication.*

In District Court.

No. 128.

H. C. ARNOLD
vs.
JAKE ARNOLD et al.

STATE OF OKLAHOMA,
Hughes County, ss:

Proof of Publication.

T. T. Baker, being duly sworn, deposes and says that he is the editor of the Holdenville Times, a weekly newspaper printed and published at Holdenville, in said county, and having a general circulation in Holdenville, and in said county.

That a notice, of which the annexed is a true copy, was published for three consecutive weeks in said newspaper; the first publication of said notice in said newspaper being the issue thereof bearing the date of the 14th day of August, 1908, and the last publication of said notice in said newspaper being in the issue thereof bearing date of the 28th of August, 1908.

(Signed) T. T. BAKER.

Subscribed and sworn to before me by T. T. Baker, the editor of the Holdenville Times, this 24 day of Sept. 1908.

[SEAL.] E. F. MESSENGER,
Clerk District Court.

(*Notice Annexed to Proof of Publication.*)

Warning Order.

(First Published in Holdenville Times August 7th, 1908.)

No. 128.

STATE OF OKLAHOMA,
Hughes County:

In District Court.

No. 128.

H. C. ARNOLD, Plaintiff,
vs.
JAKE F. ARNOLD, MARTHA ADKINS, W. B. ADKINS, and THE RICHARDSON DRY GOODS COMPANY, a Corporation, Defendants.

37 Said defendant, the Richardson Dry Goods Company, a corporation, will take notice that it has been sued in the above

named court for foreclosure of mortgage on lot No. 2, in block No. 19, and lot No. 4, in Block No. 20, in the town of Yeager, Oklahoma, and north half of southeast quarter of section 13, township 8 north, range nine east, Hughes county, Okla., and must answer the petition filed therein by said plaintiff on or before the 17th day of September, A. D. 1908, or said petition will be taken as true, and a judgment for said plaintiff in said action for foreclosure of all right, claim or equity of redemption in the above described real estate will be rendered accordingly.

Dated this 6th day of August, 1908.

O. A. MORTON,
Att's for Pl't'ff.

Attest:
E. F. MESSENGER,
District Clerk.

(Endorsement:) No. 128. H. C. Arnold vs. Jake Arnold. Affidavit of Publication of Notice. Filed Sept. 24, 1908. E. F. Messenger, Clerk District Court, Hughes Co., Okla.

38 *Amended Answer of Martha Adkins.*

In the District Court of Hughes County, State of Okla.

No. 128.

H. C. ARNOLD, Plaintiff,
vs.
JAKE F. ARNOLD et al., Defendants.

Amended Answer of Martha Adkins.

Comes now Martha Adkins, one of the defendants in the above styled cause, and by leave of the court first had and obtained, for her amended answer herein, denies each and every material allegation made and presented in plaintiff's petition herein, and calls for strict and positive proof thereof.

Second. And for further answer and by way of affirmative relief herein, said defendant charges and avers:

1st. This defendant and said defendant W. B. Adkins are, and for many years last past have been husband and wife and have all the while since said marriage *have* lived and cohabited together as man and wife; that they are now at this present time, and all the time mentioned and referred to in plaintiff's petition were, husband and wife and so living together in said county of Hughes; that said defendant Martha Adkins is a Creek citizen and a member of the Creek Nation, was living on the 1st day of April, 1899, and as such citizen was entitled to be enrolled and was so enrolled, as a Creek Citizen of said Creek Nation, and thereafter received her allotment as such citizen out of the domain of the Creek Nation; that said de-

fendant W. B. Adkins, is not and never was, a Creek citizen either by birth or by adoption into said Creek tribe, but is now, and ever has been, a non-citizen of said tribe and nation; that of said marriage between this defendant and said defendant, W. B. Adkins, there was a daughter born and was named Otheola Adkins; that
39 said daughter was the only child, male or female, ever born of said marriage; that said daughter thereby became a member of said Creek Nation, and entitled to enrollment as a member thereof, and entitled to participate in the general allotment of the domain of said nation, under and by virtue of the Original Creek Treaty or Agreement; that said daughter was so enrolled as such citizen for said purposes, and her said enrollment was duly approved by the Secretary of the Interior, in the way and manner provided by law in like cases and thereupon said daughter became endowed with all the rights and privileges of said citizens of said nation in the allotment of the lands of said nation.

2nd. That on the — day of November, 1901, said daughter departed this life intestate and without husband or children or the descendants of any child or children, and being an infant at the time of her death, and leaving no brothers or sisters or the descendants of any brothers or sisters to survive her at the time of her death; that at the time of her death, said daughter left her surviving this defendant as her mother and said defendant, W. B. Adkins, her father; that this defendant as said mother is the nearest relation of said daughter, and was the nearest relation to her at the time of her death, and as such nearest relation was, at the time of said death, and still is, the sole and only heir of said daughter, and as such heir this defendant became entitled to all the estate both real and personal of which said daughter died seized possessed or entitl-, and to all property real of personal to which said daughter would have been entitled as such Creek citizen in anywise, had she still lived to receive her full benefits or all property due her as such Creek citizen; that said W. B. Adkins took no right, title or interest whatever in and to any of such property, real or personal belonging to said daughter or to
40 which she was thus entitled; that at the time of her death, said daughter, this defendant and her said father lived and resided in the Creek Nation and in that portion thereof now composing Hughes county; that the laws of descent and distribution of the Creek Nation *was* in full force and effect in said nation at the time of the death of said daughter, which laws so far as applicable to the matters of this suit, are as follows:

"SEC. 6. Be it further enacted that if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested persons, and in all cases where there are no children, the nearest relation shall inherit the property."

"SECTION 8. The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate, if there are no heirs and a child's part if there should be other heirs, in all cases where there is no will. The husband surviving shall inherit of a deceased wife in like manner."

and that all of the property real and personal, of which said daughter died seized or entitled by reason of her being a Creek citizen, passed to this defendant exclusively and the lands of said nation *to* which she would have received had she lived, passed also to this defendant to the exclusion of said defendant W. B. Adkins.

3rd. That by reason of said citizenship and enrollment of said Otheola Adkins, the daughter aforesaid, one hundred and sixty acres of land was duly allotted and set apart out of the domain of the Creek nation by the Dawes Commission as provided by law, and after the death of said daughter, patents were duly issued to the heirs of said Otheola Adkins, and approved by the Secretary of the Interior, in the way and manner required by law, and thereafter duly
41 recorder, as so provided in like cases; that the North half of the South east Quarter of section thirteen, township eight north, range nine east, mentioned and described in plaintiff's petition is a part and portion of said One hundred and sixty acres of land above referred to and thus patented as aforesaid; that this defendant is the owner in fee simple of said lands thus described in said petition and herein sought to be subjected to the payment of said note and mortgage therein described that this defendant has at no time or place, made executed or delivered any deed or conveyance of any kind to said Jake F. Arnold or any one else, for said lands thus mentioned in said petition or any part thereof; and that this defendant is now and ever has been since said lands were thus segregated as aforesaid, in the full and complete possession of said lands and claims the same as her own in fee simple.

4th. That prior to the 23rd day of February, 1907, said W. B. Adkins pretended to make and execute to said Jake F. Arnold a deed for said north half of the south east quarter of section thirteen, township eight north, range nine east, in Hughes county, and this defendant signed said deed as the wife of said W. B. Adkins for the purpose only of relinquishing her dower in said lands described in said deed, when, in fact said W. B. Adkins had no right, title or interest in said lands and this defendant then nor at any other time had any dower therein, but had, held and owned the fee simple title thereto; that at the time of making said deed by said W. B. Adkins as aforesaid, this defendant and said W. B. Adkins were man and wife and had been for a long time prior thereto and ever since said date, and were then living and cohabiting together as man and wife in said Creek Nation and in that portion thereof now embraced in said county of Hughes where said lands are situated; that said
42 pretended deed of said W. B. Adkins was so executed in said Creek Nation, and is now of record in the proper office for recordation of deeds, of Wewoka, Oklahoma, and was so recorded long prior to the 16th day of November, 1907, under the laws in force at that time, a copy of which deed is, or will be by permission of the court, filed herewith as part hereof marked exhibit "A;" that said deed conveys to said Jake F. Arnold no right, title or interest in said lands but that said deed as well as said mortgage mentioned and described in plaintiff's petition are clouds upon the title to said lands therein described as belonging to this defendant, and this de-

fendant asks that the same may be cancelled and set aside as to this defendant and remove the same as clouds upon said title; that as to said other lands, to-wit: Lot No. 2 in Block 19 and Lot 4 in Block No. 20, in the Town of Yeager, Oklahoma, this defendant has nothing whatever to do and never at any time has any right, title or interest and claims none at this time; nor does she have any interest in said note and knows nothing about the same.

5th. That said pretended deed of said W. B. Adkins to said Jake F. Arnold, together with the certificates of acknowledgement thereto are as follows:

"Warranty Deed with Relinquishment of Dower.

Know all men by these presents: That W. B. Adkins of Yeager, Indian Territory, and Martha J. Adkins his wife, party of the first part, in consideration of the sum of Fifteen Hundred Dollars to me paid by Jake F. Arnold cashier of Yeager, Indian Territory, party of the second part, the receipt whereof is hereby acknowledged, do hereby bargain, grant, sell and convey unto said Jake F. Arnold, cashier Farmers Bank of Yeager, I. T., his heirs and assigns, a certain lot, parcel or tract of ground situated in the Creek Na-
43 tion, Indian Territory, described as follows, to-wit: North half of the south east quarter of section thirteen, township eight north, range nine east, of the Indian Base and Meridian in the Indian Territory, with all privileges and appurtenances thereto belonging. To have and to hold the aforegranted premises unto the said party of the second part, his heirs and assigns in fee simple forever; and I, the said W. B. Adkins, for myself and my heirs, executors and administrators, do covenant with the said party of the second part, his heirs and assigns, that the said property is free from all incumbrances; that I have a good right to sell and convey the said property, and that I will, and my heirs, executors and administrators, shall warrant and defend the same unto the said party of the second part, his heirs and assigns forever, against all lawful claims and demands of all persons.

And for the consideration aforesaid, and for divers other good and valuable considerations, I, Martha J. Adkins, wife of the said W. B. Adkins, do hereby release and quit claim unto said party of the second part, his heirs and assigns forever, all of my right, claim or possibility of dower in or out of aforesaid property.

Witness our hands and seals on this the 15th day of January, 1907.

W. B. ADKINS. [SEAL.]
MARTHA J. ADKINS. [SEAL.]

UNITED STATES OF AMERICA,
Indian Territory, Western District, ss:

On this the 15th day of January, 1907, personally appeared before me a Notary Public within and for the above named district W. B. Adkins to me personally well known as the person subscribing the foregoing instrument and acknowledged that he had sub-

scribed and executed the same for the consideration and purposes therein set forth as his free, voluntary act and deed. And I
44 further certify that on this day also voluntarily appeared before me, the undersigned notary public Martha J. Adkins, the wife of said W. B. Adkins, well known to me as the person whose name appears upon the within and foregoing deed, and in the absence of her said husband declared that she had of her own free will signed the relinquishment of dower therein expressed, for the purposes and consideration therein contained and set forth without compulsion or undue influence of her husband.

Witness my hand and seal as such notary public on the day and year first above mentioned.

CHAS. BURTON,
Notary Public.

My commission expires Aug. 22nd, 1910.

That said deed was prepared from a blank form and is in the usual form of deed used to relinquish the dower rights of married women in the lands of their husbands under the law as it was in force at the time said deed was pretended to have been executed, and the same purports to relinquish defendant's dower in said lands and nothing more, and nothing more than a dower therein can be conveyed by said pretended deed; that the date of recordation of said deed of said W. B. Adkins to said Arnold, as shown by the endorsement on the back of said deed is the 17th day of January, 1907, and defendant alleges that said date is the correct date of recordation thereof.

Wherefore this defendant prays that said pretended deed from said W. B. Adkins to said Arnold and said mortgage given by said Arnold upon said lands aforesaid be cancelled and set aside as to this defendant and removed as a cloud upon the title to said lands; that she be decreed to be the owner in fee simple to said lands herein claimed; that she be decreed her proper costs herein expended; and that all such other further and general relief herein may be granted to this defendant as the nature of this case may require, or which to equity and good conscience may seem just and proper. And defendant will ever pray, etc.

45 MARTHA ADKINS,
Defendant.

By COUNSEL.

L. C. LAWSON,
CRUMP & ROGERS,
Counsel for said Defendant.

By agreement of counsel for plaintiff and defendant Martha Adkins the verification of the above and foregoing answer of said Martha Adkins is waived.

L. C. LAWSON,
CRUMP ROGERS,
Counsel for Plaintiff.
O. A. MORTON,
Counsel for said Defendant.

(Endorsement:) #128. H. C. Arnold, Plaintiff, vs. Jake F. Arnold et al., Defendant. Amended Answer of Martha Adkins. Filed Apr. 7, 1909. E. F. Messenger, Clerk of District Court, Hughes County. Crump & Rogers, Lewis C. Lawson, Counsel for Defendant.

46 *Demurrer to Amended Answer.*

In the District Court in and for Hughes County, Oklahoma.

No. 128.

HENRY C. ARNOLD, Plaintiff,
vs.
JAKE F. ARNOLD et al., Defendants.

Demurrer to Amended Answer of Martha Adkins.

Comes now the plaintiff in the above entitled cause and demurs to all of the amended answer of defendant, Martha Adkins, except the first paragraph thereof or general denial contained therein for the reason that the same does not state facts sufficient to constitute a defense to plaintiff's petition or any part thereof; and, for the further reason, that the same does not state facts sufficient to entitle her to affirmative relief, as prayed for therein.

O. A. MORTON &
J. R. WITTY,
Attorneys for Plaintiff.

(Endorsed:) No. 128. Henry C. Arnold vs. Jake F. Arnold et al. Demurrer to Amended Answer of Martha Adkins. O. A. Morton and J. R. Witty, Att'ys for Plain. Filed Apr. 8, 1909. E. F. Messenger, Clerk of District Court, Hughes County.

47 No. 128.

H. C. ARNOLD, Plaintiff,
vs.
JAKE F. ARNOLD et al., D'f'ts.

Amended Answer to the Amended Answer and Cross-petition of Martha Adkins.

Comes now the defendant, Martha Adkins, by counsel on this the 21st day of July, 1909, and in compliance with an order herein made at this term of this court, and as an amended answer to her former amended answer and cross petition herein filed at a former term of this court, charges and avers that, at no time or place, or in any way or manner whatever, has she, the said defendant, received any consideration whatever for the lands mentioned and described in her said former amended answer and cross petition hereinbefore filed in this cause or for the execution of the said deed for said lands

therein mentioned; nor has she, said defendant, at any time or place or in any way, form or manner whatever, received, directly or indirectly any part or portion of the said consideration of fifteen hundred dollars mentioned in said deed as the consideration for said lands therein described; nor has she the said defendant at any time or place, or in any way, form or manner, either directly or indirectly received, any consideration of any kind, character or description whatever, for the execution of said deed or for the said lands therein and in said amended answer and cross petition, mentioned and described, or by virtue of said deed having been so executed and said lands having been thus attempted — be conveyed by said deed or through its force and effect.

MARTHA ADKINS,
By COUNSEL.

CRUMP & ROGERS,
LEWIS C. LAWSON,
Counsel for Defendant Martha Adkins.

Verification of this answer is waived by agreement of coun-
48 sel for plaintiff and defendant Martha Adkins, as evidenced by court record.

(Endorsement:) No. 128. H. C. Arnold, Plaintiff, vs. Jake F. Arnold, et al. Def'ts. Amended Answer to Amended Answer and Cross Petition of Martha Adkins. Filed July 21, 1909. E. F. Messenger, Clerk of District Court, Hughes County.

49 *Demurrer to Third Amended Answer.*

In the District Court in and for Hughes County, State of Okla.

128.

H. C. ARNOLD, Plaintiff,
vs.
JAKE F. ARNOLD, MARTHA ADKINS, et al., Defendants.

Demurrer to 3rd Amended Answer and Cross-bill of Martha Adkins.

Comes now the plaintiff in above entitled cause and demurs to the third amended answer of Martha Adkins for the reason that same does not set up any defense to this action, nor does it set up any cause of action by way of cross complaint or cross bill against the plaintiff.

O. A. MORTON AND
J. R. WITTY,
Attorneys for Plaintiff.

(Endorsement:) No. 128. H. C. Arnold vs. Jake F. Arnold. Martha Adkins, et al. Demurrer of Plaintiff to Third Amended Answer of Martha Adkins. Filed July 23, 1909. E. F. Messenger, Clerk of District Court, Hughes County. O. A. Morton and J. R. Witty, Att'ys for Plain-.

50 *Motion.*

No. 128.

H. C. ARNOLD, Plaintiff,
vs.
JAKE F. ARNOLD et al., Def'ts.

Motion of Martha Adkins.

On this the 24th day of July, 1909, comes defendant Martha Adkins, and the court having sustained the demurrer of plaintiff to her amended answer and cross petition and amended answer thereto filed at a former day of this court, moves the court to suspend further action in this cause for a period of thirty days from the adjournment of this court for the purpose of taking an appeal or petition in error to the Supreme Court of this State from said ruling of the court on said demurrer.

MARTHA ADKINS,
By COUNSEL.

CRUMP & ROGERS,
LEWIS C. LAWSON,
Counsel for said Defendant.

(Endorsement:) No. 128. H. C. Arnold, Plaintiff, vs. Jake F. Arnold, et al., Def'ts. Motion. Filed July 24, 1909. E. F. Messenger, Clerk of District Court, Hughes County.

51 *Motion for Judgment.*

In the District Court in and for Hughes County, Oklahoma.

No. 128.

H. C. ARNOLD, Plain-,
vs.
JAKE F. ARNOLD, MARTHA ADKINS, et al.

Motion for Judgment.

Comes now plaintiff, by J. R. Witty his attorney, and moves the court to render judgment for plaintiff, H. C. Arnold, against the defendant Martha Adkins, on the pleadings of plaintiff and defendant Martha Adkins filed herein.

J. R. WITTY,
Attorney for Plain-.

(Endorsement:) No. 128. H. C. Arnold vs. Jake Arnold, et al. Motion for Judgment against Martha Adkins. Filed July 27, 1909. E. F. Messenger, Clerk of District Court, Hughes County. O. A. Morton and J. R. Witty, att'y- for Plain-.

52 *Motion for New Trial.*

No. 128.

H. C. ARNOLD, Plaintiff,
vs.
JAKE F. ARNOLD et al., Def'ts.

Motion for New Trial.

Comes now the defendant Martha Adkins, and moves the court for a new trial in this cause on the following ground and reasons:

First. Because the court erred in sustaining the demurrer of plaintiff to the two amended answers and cross petitions herein filed by said defendant.

Second Because the court erred *and* said decree entered herein on this the 25th day of September, 1909, holding and decreeing that said Martha Adkins has no interest in and to the said lands described in her answer and cross petitions herein filed and mentioned in said decree.

Third. Because the court erred in overruling said defendants' motion herein made to suspend further action herein after sustaining said demur- and by so doing preventing this defendant from taking an appeal and petition in error from said action of the court sustaining said demurrer before further proceedings in this case.

Fourth. Because the court erred in rendering a decree herein upon the pleading- in the case as they stood at the time of said motion and without further pleadings therein.

Fifth. Because the court erred in decreeing said lands to be sold to satisfy the debt of said other defendants in said cause, to the injury and prejudice of this defendant and her rights in said lands.

Sixth. Because the court erred in holding and decreeing
53 That said deed from W. B. Adkins to said Jake F. Arnold, mentioned in this case, passed the fee simple title thereto of this defendant, in and to said lands under and by virtue of said deed.

Seventh. Because said decree is not sustained by sufficient evidence and is contrary to law.

Eighth. Because of the error of law occurring at the trial and excepted — by said defendant.

Ninth. Because said decree and decisions of the court are contrary to the law governing the matters in controversy in this case.

LEWIS C. LAWSON,
Counsel for Martha Adkins.

(Endorsement:) H. C. Arnold, Plaintiff, vs. Jake F. Arnold, et al., Def'ts. No. 128. Motion for new trial. Filed Sept. 25, 1909. E. F. Messenger, Clerk of District Court, Hughes County. Lewis C. Lawson, Counsel for defendant Martha Adkins.

54 *Journal Entries.*

TUESDAY MORNING, *September* 8, 1908.

And now on this the 8th day of September, 1908, Court convened pursuant to the order of the Supreme Court of the State of Oklahoma. Present, the Honorable John Caruthers, Judge, E. F. Messenger, Clerk, W. P. Langston, County Attorney, and James K. King, Sheriff.

Public proclamation of the opening of the Court having been announced, proceedings were had as follows, to-wit:

And now it is ordered that Court adjourn until Tuesday Morning September 15, 1908, at 9 o'clock a. m.

MONDAY MORNING, *September* 21, 1908.

(The same being a regular day of said term of said Court.)

And now Court convened on this the 21st day of September, A. D. 1908, pursuant to adjournment, present and presiding as on September 19, 1908, before whom the following (among other) proceedings were had:

No. 128.

H. C. ARNOLD
vs.
JAKE F. ARNOLD et al.

And now both parties being present by their respective attorneys, defendants file their demurrer and cross-petition herein.

And now the defendants' demurrer is withdrawn and plaintiff filed demurrer to cross petition of defendant.

And now it is ordered that Court adjourn until tomorrow morning at 9 o'clock.

(Signed) JOHN CARUTHERS, *Judge.*

TUESDAY MORNING, *March 16th, A. D.* 1909.

55 And now on this the 16th day of March, A. D. 1909, Court convened pursuant to order — the Supreme Court of the State of Oklahoma. Present, the Honorable John Caruthers, Judge, E. F. Messenger, Clerk, W. P. Langston, County Attorney, James K. King, Sheriff, and Gus G. Le Compte, Stenographer. Public proclamation of the opening of the Court having been announced, proceedings were had as follows, to-wit:

An- now it is ordered that Court adjourn until tomorrow morning at 9 o'clock.

(Signed) JOHN CARUTHERS, *Judge.*

MONDAY MORNING, *April* 5, 1909.

(The same being a regular day of said term of said Court.)

And now on this the 5th day of April, A. D. 1909, Court con-

vened pursuant to adjournment, present and presiding as on April 3, 1909, before whom the following proceedings (among others) were had, to-wit:

No. 128.

H. C. ARNOLD
vs.
JAKE F. ARNOLD et al.

And now this cause is passed until tomorrow April 6, 1909.

And now it is ordered that Court adjourn until tomorrow morning at 9 o'clock.

(Signed) JOHN CARUTHERS, *Judge*.

TUESDAY MORNING, *April* 6, 1909.

And now on this the 6th day of April, A. D. 1909, Court convened pursuant to adjournment, present and presiding as
56 on yesterday before whom the following proceedings (among other) were had, to-wit:

No. 128.

H. C. ARNOLD
vs.
JAKE F. ARNOLD et al.

And now plaintiff is present by counsel and defendants are present by counsel and the demurrer herein to cross-petition is sustained to which defendant Martha Adkins excepted. And now leave is granted to file amended answer herein and 24 hours *is* given to file same.

And now it is ordered that Court adjourn until tomorrow morning at 9 o'clock.

(Signed) JOHN CARUTHERS, *Judge*.

THURSDAY MORNING, *April* 8, 1909.

(The same being a regular day of said term of said Court.)

And now on this the 8th day of April, 1909, Court convened pursuant to adjournment, present and presiding as on yesterday before whom the following proceedings were (among others) had, to-wit:

In the District Court of Hughes County, State of Okla.

No. 128.

HENRY C. ARNOLD, Plaintiff,
vs.
JAKE F. ARNOLD, MARTHA ADKINS, W. B. ADKINS, and THE RICHARDSON DRY GOODS COMPANY, a Corporation, Defendants.

Decree.

This cause coming on to be heard this 8th day of April, 1909, the same being one of the regular days of holding court at the March term of the District Court of Hughes County, State of Oklahoma, and due proof having been made and filed showing personal service on the defendants, Jake F. Arnold, Martha Adkins and W. B. Adkins, and of the service of notice of the object of this action upon the defendant, The Richardson Dry Goods Company, a foreign corporation, by publication as required by law; and it appearing from an examination of the papers and files in this cause that defendant W. B. Arkins disclaims all interest in the property which is the subject matter of this suit and that the defendant Martha Adkins has filed her answer herein disclaiming any interest in and to a part of the property which is the subject matter of this suit, to-wit: Lots No. 2 in Block 19, and Lot No. 4 in Block No. 20, in the Town of Yeager, Oklahoma, but denying right of plaintiff to subject the North Half of the South East Quarter of Section 13, Township 8 North, Range 9 East, Hughes County, Oklahoma, to the foreclosure and payment of plaintiff's debt as in this action set out, and files her cross petition asking for affirmative relief, to which cross petition plaintiff files his demurrer, which demurrer is still pending, cause continued as to said defendant Martha Adkins in so far as this action affects the said North Half of the Southeast Quarter of Section 13, Township 8 North, Range 9 East, Hughes County, Oklahoma.

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And it further appearing that the defendants, Jake F. Arnold and the Richardson Dry Goods Co., a foreign corporation, answered not but wholly made default, and after being each three times called in open Court and warned to plead answer *on* demur, or judgment would be taken against them as prayed in plaintiff's petition, came not but wholly made default, which default was ordered to be entered of record.

And proofs of the matter and things alleged in the petition having been duly taken in open court, from which proof so taken it satisfactorily appears that there is now due on said note and mortgage the principal sum of $2,090.00 and $300.60 interest, making the total sum of $2,390.60; And that said notes specify that said indebtedness shall bear interest at the rate of ten per cent per annum and that said mortgage has the words "appraisement waived" therein inserted. And the court finds that said plaintiff has a lien on the lands and tenements described in said petition

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by virtue of the mortgage in said petition set out to secure the payment of said indebtedness interest and costs, said property being described as follows:

Lot No. 2, in Block No. 19, and Lot No. 4 in Block No. 20 in the town of Yeager, Oklahoma, and the North Half of the Southeast Quarter of Section 13, Township 8 North, Range 9 East, Hughes County, Oklahoma.

It is therefore considered, ordere- and adjudged by the court that the said plaintiff do have and recover of and from the said defendant Jake F. Arnold the sum of $2,390.60, the amount so — aforesaid found due the plaintiff and the costs herein taxed at $—, and that said judgment bear interest at the rate of ten per cent per annum.

And it is further ordered, adjudged and decreed that in case said defendant fails for six months from date of the rendition of this judgment to pay to said plaintiff the sum of $2,390.60, the amount so as aforesaid found due said plaintiff, together with the interest thereon and the costs of this action, an order of said sale issue to the Sheriff of the said County of Hughes, in the State of Oklahoma, commanding him to advertise and sell, according to law, without appraisement, the lands and tenements in said petition described, to-wit: Lots No. 2 in Block No. 19, and Lot No. 4 in Block No. 20, in the Town of Yeager, Hughes County, Oklahoma, and the North Half of the Southeast Quarter of Section 13, Township 8 North, Range 9 East, Hughes County, State of Oklahoma, and to
59 apply *to* the proceeds arising from said sale: (1) In payment of the costs of said sale and of this action. (2) In payment *of* said plaintiff of said sum of $2,390.60, the amount so as aforesaid found due said plaintiff*s* together with the interest thereon. (3) That the residue, if any there be, he pay to the said defendant Jake F. Arnold. If the amount derived from said sale is insufficient to satisfy the judgment and costs, let execution issue against said defendant Jake F. Arnold, for the remainder unpaid.

And it is further ordered and adjudged and decreed by the Court that from and after the sale of said lands and tenements under and by virtue of this judgment and decree that the said defendants Jake F. Arnold, W. B. Adkins and the Richardson Dry Goods Company, a corporation, and all persons claiming under them or either of them since the commencement of this action, be and they and each of them are forever barred and foreclosed of and from all lien upon, right, title, interest, estate or equity of, in or to said lands, tenements or any part thereof; and

Whereas, this cause has been continued as to the defendant Martha Adkins, pending the final adjudication of her claim as to the North Half of Southeast Quarter of Section 13, Township 8 North, Range 9 East, Hughes County, Oklahoma, this judgment is suspended as to the said North Half of the Southeast Quarter of Section 13, Township 8 North, Range 9 East, Hughes County, Oklahoma, until the claim of the said defendant, Martha Adkins, to the same is finally adjudicated.

And now it is ordered that Court adjourn until tomorrow morning at 9 o'clock.

(Signed) JOHN CARUTHERS, *Judge.*

MONDAY MORNING, *June* 7, 1909.

60 And now on this the 7th day of June, A. D. 1909, Court convened pursuant to Law, and as per former adjournment, Present the Honorable John Caruthers, Judge, E. F. Messenger, Clerk, W. P. Langston, County Attorney, James K. King, Sheriff. Public proclamation of the opening of Court having been announced the following proceedings (among others) were had, to-wit:

And now it is ordered that Court adjourn until Monday, June 21, 1909, at 9 o'clock A. M.

MONDAY MORNING, *July* 5, 1909.

(The same being a regular adjourned day of said term of said Court.)

And now on this the 5th day of July, 1909, Court convened pursuant to adjournment, present and presiding the Hon. John Caruthers, Judge of the Ninth Judicial District of the State of Oklahoma, E. F. Messenger, Clerk, W. P. Langston, County Attorney, James K. King, Sheriff, and Gus G. Le Compte, Official Stenographer, before whom the following proceedings (among others) were had, to-wit:

IN THE MATTER OF RESETTING CIVIL DOCKET.

And now it is ordered by the Court that the following civil cases be and they are hereby reset for trial as follows:

For Monday, July 19, 1909, 128 (and others.)

And now it is ordered that Court adjourn until Monday, July 12, 1909, at 9 o'clock.

(Signed) JOHN CARUTHERS, *Judge*.

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TUESDAY MORNING, *July* 20, 1909.

(The same being a regular day of said term of said Court.)

And now on this the 20th day of July, A. D. 1909, Court convened pursuant to adjournment, present and presiding as on yesterday, before whom the following proceedings (among others) were had, to-wit:

No. 128.

H. C. ARNOLD
vs.
MARTHA ADKINS et al.

And now both parties are present by counsel and plaintiff's demurrer to the answer and cross petition herein is argued and submitted to the Court and is by the Court sustained to which defendant Martha Adkins excepts. And now said defendant is given until July 23, 1909, to amend answer by alleging that said defendant never received any of the proceeds of sale of the lands in controversy.

And now it is ordered that Court adjourn until tomorrow morning at 9 o'clock.

(Signed) JOHN CARUTHERS, *Judge*.

WEDNESDAY MORNING, *July* 21, 1909.

And now on this the 21st day of July, A. D. 1909, Court convened pursuant to adjournment, present and presiding as on yesterday before whom the following proceedings (among others) were had, to-wit:

128.

H. C. ARNOLD, Plaintiff,
vs.
MARTHA ADKINS et al.

And now plaintiff agrees to waive verification of the amended answer and cross-petition of Martha Adkins herein.

62 And now it is ordered that Court adjourn until tomorrow morning at 9 o'clock.

(Signed) JOHN CARUTHERS, *Judge.*

TUESDAY MORNING, *July* 27, 1909.

(The same being an adjourned day of said term of said Court.)

And now on this the 27th day of July, 1909, Court convened pursuant to adjournment, present and presiding as on Saturday, July 24th, 1909, before whom the following proceedings (among others) were had, to-wit:

No. 128.

H. C. ARNOLD
vs.
MARTHA ADKINS et al.

And now on this 24th day of July, 1909, both parties are present by counsel and the demurrer herein to amended answer of Martha Adkins, having been argued and submitted to the Court is by the Court sustained. Defendant excepts.

No. 128.

H. C. ARNOLD
vs.
MARTHA ADKINS.

And now both parties are present by counsel and this cause goes over until September, 1909, for further hearing.

And now it is ordered that Court adjourn until September 20, 1909, at 9 o'clock.

(Signed) JOHN CARUTHERS, *Judge.*

SATURDAY MORNING, *September* 25, 1909.

(The same being an adjourned day of said term of said Court.)

63 And now on this the 25th day of September, A. D. 1909, Court convened pursuant to adjournment, present and presiding as on yesterday before whom the following proceedings (among others) were had, to-wit:

In the District Court in and for Hughes County, Oklahoma.

No. 128.

H. C. ARNOLD, Plaintiff,
vs.
JAKE F. ARNOLD, MARTHA ADKINS, W. B. ADKINS, THE RICHARDSON DRY GOODS CO., a Corporation, Defendants.

Journal Entry.

This cause coming on finally to be heard on this September 25, 1909, before me, John Caruthers, Judge of this Court, upon the issues raised between the plaintiff, H. C. Arnold, and the defendant, Marthat Adkins, and the plaintiff being present by O. A. Morton and J. R. Witty his attorneys, and defendant Martha Adkins being present by Crump, Rogers & Harris and Lewis C. Lawson, her attorneys; and the said defendant having filed in this court her amended answer and cross petition to the plaintiff's petition, and the plaintiff having interposed his demurrer thereto on the grounds that the said amended answer and cross petition of said Martha Adkins did not state facts sufficient to constitute a defense or cause of action which demurrer was sustained by the court on the 24th day of July, 1909, and whereupon the defendant Martha Adkins, filed her motion to suspend further action pending an appeal, which motion was filed on the 24th day of July, 1909, and which motion the court overruled on the 27th day of July, 1909, and the plaintiff having on the 27th day of July, 1909, filed his motion for judgment on the pleadings as against said Martha Adkins, which motion for judgment the court on this the 25th day of September, 1909, sustains.

It is therefore considered, ordered, and adjudged and decreed by the court that plaintiff have judgment on the pleadings as
64 against said Martha Adkins; that said Martha Adkins has no interest in and to said lands described in her answer and cross-petition, to-wit: The North Half of the Southeast Quarter of Section 13, Township 8 North, Range 9 East, Hughes County, Oklahoma.

It is further ordered that in the event the said Jake Arnold fails for six months from the date of the rendition of the judgment against him in this action, to-wit: April 8th, 1909, to pay said plaintiff the sum of $2,390.60, the amount so found due said plaintiff in the cause by a decree rendered against said Jake F. Arnold, on the said April 8, 1909, together with the interest thereon and the costs in this action herein taxed at $—, an order of sale issue to the Sheriff of Hughes County, State of Oklahoma, commanding him to advertise and sell according to the law, without appraisement, the lands and tenements in said petition of plaintiff described, to-wit: Lot No. 2 in Block No. 19 and Lot No. 4 in Block 20 in the Town of Yeager, Hughes County, State of Oklahoma, and the North Half of the Southeast Quarter of Section 13, Township 8 North, Range 9 East, Hughes County, State of Oklahoma, and apply the proceeds arising

from said sale as provided in a former decree rendered herein on April 8, 1909, which decree is referred to herein and made a part hereof, to all of which Martha Adkins excepts.

This 25th day of September, 1909.

No. 128.

H. C. ARNOLD, Plaintiff,
vs.
JAKE F. ARNOLD, MARTHA ADKINS, W. B. ADKINS, THE RICHARDSON DRY GOODS CO., a Corporation, Defendants.

And now comes Martha Adkins by her counsel Lewis C. Lawson, and files herein her motion for a new trial, which motion is
65 argued and submitted to the court and is overruled, to which ruling of the court the defendant Martha Adkins excepts and asks that her exceptions be noted of record which is done.

And now the defendant Martha Adkins prays an appeal to the Supreme Court, which is granted. And now it is ordered that defendant be and she is allowed sixty days in which to make and file case-made, ten days allowed plaintiff to suggest amendments and five days allowed for settlement, and nin-ty days in which to file the same in the Supreme Court. Supersedeas bond is fixed herein at $2,000.00.

And now it is ordered that Court adjourn until November 1, 1909.

(Signed) JOHN CARUTHERS, *Judge.*

66 No. 128.

HENRY C. ARNOLD, Plaintiff,
vs.
JAKE F. ARNOLD et al., Defendant-.

Certificate to Transcript.

STATE OF OKLAHOMA,
County of Hughes, ss:

I, E. F. Messenger, Clerk of the District Court for said County, do hereby certify that the foregoing is a full, true and correct transcript of the record in the above entitled cause.

In testimony whereof, I have hereunto set my hand and seal of the Court, this 13 day of October, 1909.

[SEAL.] (Signed) E. F. MESSENGER, *Clerk.*

67 *Certified Bill of Costs.*

No. 128.

HENRY C. ARNOLD, Plaintiff,
vs.
JAKE F. ARNOLD et al., Defendant-.

Bill of Costs.

E. F. Messenger, clerk	$21.20
James K. King, sheriff	7.25
Times Printing Company	5.25
E. F. Messenger, clerk, for making transcript	11.85
Total	$45.55

STATE OF OKLAHOMA,
Hughes County, ss:

I, E. F. Messenger, clerk of the district court in and for the county and state aforesaid, do hereby certify that the above and foregoing is a full, true and complete summary statement of the bill of costs in the above entitled cause, as the same appears on appearance docket one, page 128, in my office.

Witness my hand as such clerk, and official seal of said court, this the 13th day of November, 1909.

[SEAL.] E. F. MESSENGER, *Clerk.*

(Endorsement:) #1228. Martha Adkins v. H. C. Arnold et al. Filed Nov. 22, 1909. W. H. L. Campbell, Clerk.

68 In the Supreme Court of the State of Oklahoma.

MARTHA ADKINS, Plaintiff in Error,
v.
HENRY C. ARNOLD and JAKE F. ARNOLD, Defendants in Error.

Motion to Dismiss Appeal.

Comes now Henry C. Arnold, one of the defendants in error above named, and moves the Court to dismiss this cause for the following reasons, to-wit:

First. Because W. B. Adkins, a defendant in the lower court, and a party, in interest, to the judgment appealed from, by plaintiff in error, is not made a party to the proceedings in error.

Second. Because the petition in error, filed herein, is deplicitous, in that the plaintiff in error, has undertaken to bring an original action in this court, along and in conjunction with this suit in error, and it does not appear which action he is relying upon for relief.

Third. Because, plaintiff in error, has not complied with rule XXV of this court, requiring that the brief of plaintiff in error, in all cases, except felonies, shall contain an abstract or abridgment of the transcript, etc.

O. A. MORTON,
Attorney for Defendant in Error.

69 *Argument of Defendant in Error in Support of His Motion to Dismiss Plaintiff's Petition in Error Filed Herein.*

The plaintiff in error has in his motion for dismissal of this cause, assigned three grounds upon which he bases his motion:

1st. For the want of necessary parties.

2nd. Because the petition is deplicitous.

3rd. Because plaintiff in error has not complied with Rule XXV of this Court, covering the presentation of causes for review.

Defendant in error will not argue these assignments, except the first, other than to call the attention of the Court, to the other two assignments, respectively, because he considers the first assignment sufficiently well taken to dismiss this cause.

It is contended by the defendant in error, that W. B. Adkins, was a defendant in the lower court and the judgment appealed from was rendered against him, as well as against Plaintiff in error, and that his interests in this controversy is such that he is a necessary party to the appeal; and the plaintiff in error having failed to make him a party to the appellate proceedings, the appeal should be dismissed.

In the case of Jon vs. Paullin et al., the Supreme Court of Oklahoma, the Court held:

"That all parties to an action whose interests will be affected by a reversal of the judgment must be made parties to the appellate proceedings."

NOTE.—This case reported 104 Pac. 365, advance sheet #3, dated Nov. 8, 1909, opinion handed down Sept. 14, 1909.

In the case of Outcalt v. Collier, 8 Okla. 476, 58 Pac. 642, the rule is laid down by Mr. Justice Burford:

"That all parties who are parties to the proceedings in the trial court, and whose interests will be adversely affected by a reversal of the judgment, must be brought into the appellate proceedings. And further, that if the interests of those who are brought into the appellate proceedings, as parties will be injuriously affected by a reversal or modification of the judgment complained of, without a reopening of the case, as to other parties as to whose interests the judgment has become final by the failure to appeal, the appeal
70 will be dismissed."

In the case of County Commissioners vs. Harvey et al. 5 Okla. 471, 49 Pac. 1007, Mr. Justice Bierer, speaking for the court, said:

"From the numerous authorities it would appear that the proposition as to what parties must be brought before the Supreme Court in order to warrant a review of the question sought to — presented on appeal has been fully adjudicated and the rule clearly fixed.

And the rule appears to be that all persons who were parties to the proceeding in the trial court, and whose interest will be affected by a reversal of the judgment, must be *be* brought into the appellate proceeding. And also where the interests of those who are brought as parties into the appellate proceeding will be injuriously affected by a reversal or modification of the judgment complained of as to such parties, without a reopening of the case as to other parties as final by failure to appeal, so likewise the proceeding will be dismissed."

In the case of Great Western Mfg. Co. vs. Richardson, 57 Kan. 661, 47 Pac. 537, the court said:

"The rule is well settled, and has often been enforced by this court, that all persons against whom a joint judgment has been rendered must be made parties to a proceeding to reverse such judgment, and a failure to join any of them, either as plaintiffs or defendants, is ground for the dismissal of the case."

A long ling of reported cases might be cited to support this proposition, but we shall refer to only the following: McPherson vs. Storch, 49 Kas. 313, 30 Pac. 480; Loan Co. vs. Lumber Co., 53 Kas. 677, 37 Pac. 132; Norton vs. Wood, 55 Kas. 559, 40 Pac. 911; Investment Co. vs. National Bank, 56 Kas. 49, 42 Pac. 321; Bain vs. Conn. M. Life Ins. Co., 3 Kas. App. 346, 40 Pac. 817; Bonebrake vs. Aetna Life Ins. Co., 3 Kas. App. 708, 41 Pac. 67; Humphrey vs. Hunt, 9 Okla. 196-59 Pac. 971.

In the case of Jones Stationery & Paper Co. vs. Hentif, 31 Kas. 322, 1 Pac. 533, Mr. Justice Vallentine, speaking for the court, said:

"In no case should a judgment be interfered with by the Supreme Court, where one of the parties to the judgment is not a party in the Supreme Court."

See also Wedd vs. Gates et al., 15 Okla. 602, 82 Pac. 808.

71 The case at bar is an appeal taken from a judgment in the District Court of Hughes County, Oklahoma, the Petition of the plaintiff in the lower court, found on page one of the record of this cause, discloses the following state of facts:

That Henry C. Arnold, was at the time of the filing of said suit, the owner of, and in possession of one certain promissory note, for the amount of Two Thousand and Ninety (*$200,90.*) Dollars, said note bearing the interest at the rate of ten per cent per annum until paid, and that said note was signed by Jake F. Arnold, one of the parties, defendant in said suit, and secured by a mortgage duly made and executed by the said Jake F. Arnold, covering, in addition to other property, the North one-half of the South East Quarter of Sec. Thirteen (13), Township Eight (8) North, Range Nine (9) East, together with all the improvements located thereon, said note and mortgage becoming due Nov. 11, 1907; the record also disclose the fact that said mortgage was duly acknowledged, filed and recorded, as required by law, and that the said Jake F. Arnold, failed to pay the said indebtedness at the time the same became due, and this suit was filed sometime thereafter, to-wit: On the 11th day of May, 1908, to foreclose the said mortgage.

It appears that summons was duly issued and all the parties defendants were duly summoned to appear and defend the said suit; it does not appear, however, from plaintiff's petition filed in the lower court, what interest, plaintiff in error had in the said property. The plaintiff in the lower court simply alleges, as shown on page two (2) of the record:

"That the said defendant, Martha Adkins, W. B. Adkins, and the Richardson Dry Goods Co. have or claim to have, some interest in the said mortgaged premises, which, if any, accrued, since the lien of the said mortgage."

72 Upon this allegation, the said Martha Adkins, W. B. Adkins and the Richardson Dry Goods Co., were summoned to appear and defend this suit. In due time, it appears from the record that the defendant, W. B. Adkins, filed a disclaimer, as shown on page 11 of the records, and that Martha Adkins, appeared and filed her answer, by way of general denial and cross-petition; in her cross-petition, the defendant below, Martha Adkins, plaintiff in error, claims to own the North one-half of the South East Quarter of Section thirteen (13), Township Eight (8) North, Range Nine (9) East, together with all the improvements located thereon.

It will be noticed that this is the land referred to in the mortgage sought to be foreclosed. In her cross-petition, plaintiff in error, defendant below, alleges, as shown on page 9 of the record:

"That the defendant W. B. Adkins, made and delivered to the said Jake F. Arnold, his certain warranty deed, pretending to convey to the said Jake F. Arnold, the North one-half of the South East Quarter of Sec. Thirteen (13), Township Eight (8) North, Range Nine (9) East, in Hughes County, State of Oklahoma, and this defendant signed said Deed as the wife of said W. B. Adkins, for the purpose of relinquishing her dower to the same, and in fact, the said W. B. Adkins, did not own said land, and that this defendant had no dower therein to relinquish, and that said deed is now on record at Wewoka, Oklahoma, having been recorded before the 16th day of Nov., 1907, under the laws that was in force at that time, and a copy of said deed is attached hereto and marked "Exhibit A" and made a part of this petition."

To this petition Henry C. Arnold, plaintiff in the lower court, interposed, a demurrer, which was by the court sustained, and the defendant, Martha Adkins, allowed to file amended pleadings; accordingly on the 7th day of April, 1909, defendant, Martha Adkins, plaintiff in error, filed her amended answer in the way of a general denial, and cross-petition and in her said cross-petition, among other things, she alleges, as shown on page 19 of the records of this cause, as follows, to-wit:

73 "That prior to the 23rd day of February, 1907, said W. B. Adkins, pretended to make and execute to said Jake F. Arnold, a deed for said North one-half of the South East Quarter of Sec. thirteen (13), Township Eight (8) North, Range Nine (9), East, in Hughes County, State of Oklahoma, (and this defendant signed said deed as the wife of W. B. Adkins, for the purpose only

of relinquishing her dower in said lands described in said deed, when in fact, said W. B. Adkins, had no right, title, or interest in said lands, and this defendant, then, nor at any time, had any dower therein, but held and owned the fee-simple title thereto). That at the time of making of said deed by said W. B. Adkins, as aforesaid, this defendant and said W. B. Adkins, were man and wife, and had been for a long time prior thereto and ever since said date, and were then living and cohabiting together as man and wife in said Creek Nation, and in that portion thereof now embraced in said county of Hughes, where said lands are situated. That said pretended deed of the said W. B. Adkins was so executed in said Creek Nation, and is now of record in the proper office for recordation of deeds, at Wewoka, Oklahoma, and was so recorded long prior to the 16th day of Nov., 1907, a copy of which deed is, or will be, by permission of the court, filed herewith as a part hereof, marked "Exhibit A."

A copy of the said Deed is also exhibited on page- 20 and 21 of the said record, and, indeed, the plaintiff in error insists that the very reason this judgment ought to be reversed is that the said W. B. Adkins, made the deed upon which the said mortgage is predicated and that she did not make the same, though she admits being present at the time the said deed was executed by the said W. B. Adkins; and the said W. B. Adkins has not denied, or attempted to deny, the statement made by his wife, plaintiff in error, that he executed the said deed, and it is insisted in plaintiff in error's brief that the said W. B. Adkins made the deed referred to in her several answers and amended answers.

The question now arises, "Is W. B. Adkins' interest in this suit such that if a reversal of the judgment rendered in the lower court is had, he would be, in any way affected thereby?"

74 It is contended by the plaintiff in error, as above set forth, that W. B. Adkins made the deed, upon which the mortgage in question is predicate-. If the mortgagee is precluded from a foreclosure of this mortgage, by reason of the fact that the grantor of the said deed had no title in the said property, "what would be the remedy of the Mortgagee?" It could not be argued that he has no recourse in the premises, but it must be insisted, and could not be denied, that he could, in that event, proceed against the mortgagor and the grantor in the said deed for a breach of warranty.

If the reversal of this judgment is had in this proceeding in error, and plaintiff in error should succeed in her contentions, and the plaintiff below, defendant in error would be forced to resort to a suit for a breach of warranty against the said Jake F. Arnold, and W. B. Adkins, "is not the said W. B. Adkins' interest in the result of this proceeding involved?"

It seems beyond question that the said W. B. Adkins' position as alleged and contended by the plaintiff in error, is such, that he is very much interested in the result of this proceeding in error, in that he could be, and no doubt would be, compelled to defend in another suit for Breach of Warranty, in case plaintiff in error is successful in the reversal of the judgment rendered in the lower court, and in the defeating the foreclosure of the said mortgage against

said property. In accordance with the law, as laid down in the cases herein cited, the appeal should be dismissed.

We desire, simply, to call the attention of the court to the petition of the plaintiff in error, filed herein, and say in a general way, that it appears plaintiff intends to bring an original suit, as her petition, filed herein, contains much new matter, not contained in the record, and having presented a petition seeking to begin an original suit, and at the same time, asking that summons, in error, be
75 issued. It does not appear which proceeding the plaintiff in error is relying upon.

Further, we wish to call the court's attention to rule XXV, which provides that the brief of plaintiff in error:

"In all cases, except felonies, must contain an abstract or abridgement of the transcript set forth, the material parties of the proceedings, pleadings, and documents, upon which he relies to get such statements from records as are necessary for a full understanding of the question presented to this court for decision, so that no examination of the record, etc., need be made by this court."

This rule, we claim, plaintiff in error has not complied with, and consequently, the appeal should be dismissed on that account.

Respectfully submitted,

O. A. MORTON,
Att'y for Defendant in Error.

Notice.

To Martha Adkins, W. B. Adkins, Jake F. Arnold, and the Richardson D. G. Co., a corporation:

You will please take notice that I will on the — day of Jan., 1910, file the above and foregoing motion, brief and argument of counsel in support of same, in the Supreme Court of the State of Oklahoma, at Guthrie, Oklahoma, and then and there ask for thirty (30) days' time after the ruling of the court on said motion, within which to serve and file answer brief of defendant in error in the above entitled cause; in case the said motion is overruled.

O. A. MORTON,
Att'y for Defendant in Error.

76 *Acceptance of Service of Notice.*

I hereby accept service of the above and foregoing notice and acknowledge receipt of a copy of the same, together with a copy of said motion, brief and argument;

And I hereby concede the request of defendant in error for thirty (30) days — after the ruling of the court on said motion, within which to serve and file his answer brief in the said cause.

—— ——,
—— ——,
Att'ys for —— ——.

Endorsement: No. 1228. In the Supreme Court of the State of Oklahoma. Martha Adkins, Plaintiff in error, vs. Henry C. Arnold et al., Defendants in error. Motion to dismiss appeal, together with brief and argument of counsel of defendant in error, in support of said motion. (Filed January 28, 1910, W. H. L. Campbell Clerk.) —— ——, Att'y for Defendant in Error.

77 MARTHA ADKINS, Plaintiff in Error,
vs.
HENRY C. ARNOLD et al., Defendants in Error.

To Plaintiff in error this is somewhat a new undertaking and we hardly know just where we are at. On the 22nd day of November, 1909, the plaintiff in error took this appeal; and thereafter prepared her brief and served it upon counsel for defendants in error on the 1st day of January, 1910. This gave defendants thirty days in which to prepare and file their reply brief; but instead of doing that they wait until the thirty days have entirely expired and then moved this court to dismiss this appeal for the reasons assigned. All the notice plaintiff in error even now has of any thing going on this *this* court of this motion is the receipt of a copy of the notice received through the mails on the 4th day of February, 1910.

We submit this is not sufficient notice, and that the notice was not made in proper time, and should be dismissed by this court. We therefore, submit that this motion be dismissed at the cost of the defendant in error.

Upon examination, the court will find that the defendant in error did not allege what rights or interests W. B. Adkins had in the lands; but simply alleged that he was claiming some interest therein. This was not sufficient to require Adkins to file any answer or make any appearance, but he did file his answer therein and disclaimed any interest in the land. Then how did that injure the defendant in error? There was no judgment rendered against W. B. Adkins in favor of defendant in error. Then how could an appeal be the result whatever it might be, in any manner affect the defendant in error? We submit that a reversal of the lower court would not affect that rights of defendant in error as to W. B. Adkins; for Adkins disclaimed all interest in said lands, and that ends it with him forever and at all stages of the case whether reversed or affirmed.

78 Again, the pleadings of defendant in error do not show that W. B. Adkins ever had any interest in the lands. It appears only from the amended answers of plaintiff in error, Martha Adkins that W. B. Adkins, once made the deed complained of by her, and indirectly affecting the rights of defendant in error, Henry C. Arnold. W. B. Adkins was not made a party to that answer unless simply being in a way made a party defendant to the petition, make him such. If not, then W. B. Adkins was not a party below, and of course, thereby a party to the suit made so by being so joined by the defendant in error by a mere reference to him and others in the petition as aforesaid. He had disclaimed all matters in the

original petition and was thereby precluded by his own acts. Now, as to the matters set up in the answer of plaintiff in error they were all taken for confessed as to W. B. Adkins if he can be considered as a party thereto, and for that reason he has no right to demand to be made a party to the appeal, nor has any other person a right to complain because he was not made a party to the appeal.

In Hallwood Cash Register Co. vs. Dailey et al. (1905) 79 Pac. 158, the Supreme Court of Kansas held that "A party defendant in default, and who did not appear and take part in proceedings — the court below, is not a necessary party to the petition in error, in this court."

To the same effect is Zinkeisen vs. Lewis et al. (1905), 83 Pac. 28, which came on to be heard by the same Supreme Court in opposition to being heard on its merits because of the absence of several parties below who had defaulted therein; whereupon the court again held "Parties shown by the record to have made default in the trial court are not necessary parties to an appeal." Practically to the same effect is Gillette & Libby vs. Murphy, Carrell & Brough et al. 7 Ok. 91.

It is a rule, of course, that all persons who were parties below and took an active part in the controversy must be made parties in this court where the relief sought will materially injure or prejudice their interests. But to entitle them to such relief, they
79 must show themselves ever active and vigilant in defense of their own rights even before they get to this court. What judgment could be rendered in this case against W. B. Adkins? None whatever. What judgment could be rendered in the case in his favor as against defendant in error, after he has so disclaimed? None whatever. If W. B. Adkins was not properly brought into the case below, whose fault is it? Defendant had the first opportunity to make proper charges against him and wife Martha Adkins, but fails to do so. He also had his second opportunity when plaintiff in error came in and by filing her answers and cross petitions herein disclaimed the whole inside of the original transaction with Jake Arnold, but he contented himself by simply demurring to them and rested there without requiring further or other pleadings. Defendant in error chose to stand on his demurrer and motion for judgment of the pleadings and get all he asked for. It is now too late to recede from his position taken and ask for other relief in this court.

In fact I do not see what relief he could have sought against W. B. Adkins in the court below other than what he got. And I don't see what effect the action of this court can have on W. B. Adkins in finally passing upon this case.

As to the second and third grounds of dismissal, as defendant in error confessedly proclaims to have nothing to say in support of them we suppose it is not necessary for us to say anything against them.

In our judgment the court will find the petition in error full enough on all points, and in some fuller than strictly necessary.

In conclusion we will ask the court to dismiss this motion and

enforce strictly the provisions of Rule XXV wherein defendants in error are required to file their reply briefs in thirty days from receiving brief of plaintiff in error. It has not been done in this case, and plaintiff in error does not want the case held up where no diligence whatever has been shown to get ready for trial and now that the time for filing the reply brief is passed, *he*
80 asks leave even to file this motion and then given time for the brief. We oppose this and ask that it be denied by the court.

Respectfully submitted,
(Signed) LEWIS C. LAWSON,
Counsel for Plaintiffs in Error.

Endorsement: No. 1228. Martha Adkins, plaintiff in error, vs. Henry C. Arnold et al., Defendants in error. (Filed February 10, 1910, W. H. L. Campbell, Clerk.)

81 Supreme Court, March Term, 1910, March 8th, 1910—First Judicial Day.

1228.

MARTHA ADKINS, Plaintiff in Error,
vs.
HENRY C. ARNOLD et al., Defendants in Error.

And now on this day it is ordered by the court that the motion to dismiss the above appeal, be, and the same is hereby denied.

82 In the Supreme Court of the State of Oklahoma.

MARTHA ADKINS, Plaintiff in Error,
vs.
HENRY C. ARNOLD and JAKE F. ARNOLD, Defendants in Error.

Application for Time to File Answer Brief.

Comes now Osborne A. Morton and shows to the court that he is a lawyer by profession and a member of the Supreme Court bar of the State of Oklahoma; that he is attorney of record of Henry C. Arnold, one of the defendants in the above entitled cause; that on the 28th day of January, 1910, he did in good faith file in said cause in said court on behalf of Henry C. Arnold, on- of the defendants in error, a motion to dismiss the said suit; that on the 8th day of March, 1910, the said motion was by the court overruled; that he now desires to file in the said cause his answer brief; that he believes as a matter of law, the judgment of the lower court should be affirmed and he further believes that after a consideration by this court of the brief which he proposes to file in said cause the said judgment of the lower court will be by this court affirmed;

Wherefore he prays that he may have thirty (30) days from

the 22nd day of March, 1910, within which to serve and file his proposed answer brief in the said cause.

O. A. MORTON,
Attorney for Defendant in Error Henry C. Arnold.

Notice.

To Martha Adkins, W. B. Adkins, Jake F. Arnold, and the Richardson Dry Goods Company, a Corporation:

You will take notice that I will on the 22nd day of March, 1910, file the above and foregoing petition in the Supreme Court of the State of Oklahoma at Guthrie, Oklahoma, and then and there ask for thirty days' time from said date within which to serve and file answer brief of defendant in error in the above entitled cause.

O. A. MORTON,
Attorney for Defendant in Error Henry C. Arnold.

83 Endorsement: In the Supreme Court of the State of Oklahoma. No. 1228. Martha Adkins, Plaintiff in Error, vs. Henry C. Arnold et al., Defendants in Error. Application for time to file answer brief. (Filed March 22, 1910, W. H. L. Campbell, Clerk.) O. A. Morton, Att'y for Def't in Error.

84 Supreme Court, March Term, 1910, March 30th, 1910—Fourteenth Judicial Day.

1228.

MARTHA ADKINS, Plaintiff in Error,
vs.
H. C. ARNOLD et al., Defendants in Error.

And now on this day it is ordered by the court that the application of defendant in error herein for leave to file answer brief 30 days from March 22nd, 1910, be, and the same is hereby allowed.

85 Supreme Court, September Term, 1911, September 15th, 1911—Fourth Judicial Day.

1228.

MARTHA ADKINS, Plaintiff in Error,
vs.
H. C. ARNOLD et al., Defendants in Error.

And now on this day the above cause is submitted on the record and briefs filed herein.

86 Supreme Court, November Term, 1911, November 18th, 1911—Fifth Judicial Day.

1228.

MARTHA ADKINS, Plaintiff in Error,
vs.
HENRY C. ARNOLD et al., Defendants in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed. Opinion by Brewer, C.

By the COURT: It is so ordered, the above opinion is hereby adopted in whole, and judgment is entered accordingly.

87 In the Supreme Court of the State of Oklahoma.

Supreme Court Commission, Division No. Two.

(Filed November 18, 1911.)

No. 1228.

MARTHA ADKINS, Plaintiff in Error,
vs.
HENRY C. ARNOLD et al., Defendants in Error.

Syllabus.

1. Under the laws in force in Indian Territory prior to statehood, a married woman could convey the title to her real estate, the same as if she were single; and where she joins her husband in a deed of her land, and also relinquishes dower, the deed will convey the fee, though she acknowledges only the relinquishment of dower.
2. Section- 648 and 659 of Chapter 27, Mansfield's Digest of the laws of Arkansas, put in force in the Indian Territory by Act of Congress of Feb'y 19, 1903, (32 U. S. Stat. L. 841) were, in so far as they affected the conveyance by a married woman of her lands, inconsistent with section 4621, Chapter 104, of Mansfield's Digest, which was in force prior thereto, and to the extent of such inconsistency said sections 648 and 659 were not in force in Indian Territory prior to statehood.
3. Under the laws in force in Indian Territory prior to statehood, a deed by a married woman of her lands wherein she joins her husband in the operating words of grant, but acknowledges relinquishment of dower only, is not sufficiently acknowledged to entitle it to record, but it is sufficient, as between the parties or privies to convey the fee.

Error from the District Court of Hughes County.

John Caruthers, Trial Judge.

Affirmed.

Lewis C. Lawson, Crump & Rogers, Attorneys for Plaintiff in Error.

Osborn A. Morton, Attorney for Defendant in Error.

88 *Opinion by Brewer, C.*

This suit was tried in the District Court of Hughes County, Oklahoma, and is here for review of the action of the trial court in sustaining a demurrer to the answer and cross petition of plaintiff in error.

The facts are substantially as follows: Henry C. Arnold, one of the defendants in error, as plaintiff below, brought suit on note and to foreclose a mortgage on the N. ½ of the S. E. ¼ Sec. 13, Tp. 8 N. R. 9 E. Hughes County, Oklahoma, against Jake F. Arnold as mortgagor. The Richardson Dry Goods Co., W. B. Adkins and Martha Adkins, the plaintiffs in error, were made defendants below. The defendant Jake F. Arnold, the Dry Goods Co., and W. B. Adkins, defaulted and filed no pleadings in the case, and final judgment was rendered against them on account of which no complaint is made. The allegations of the petition, brought Martha Adkins into the case by the following averment: "6th. That the said defendants, Martha Adkins, W. B. Adkins and the Richardson Dry Goods Co., have, or claim to have, some interest in, or lien on the said mortgaged premises, which, if any, accrued since the lien of the said mortgage." The defendant Martha Adkins, plaintiff in error here, alone appeared and filed pleadings. The defendant Jake F. Arnold is made defendant in error, but alleges no error, and neither he nor the Richardson Dry Goods Co., will be further considered.

Hereafter for convenience the plaintiff in error will be called, defendant, and defendant in error, plaintiff.

89 The defendant Martha Adkins, appeared in the case and filed an answer consisting of a general denial and cross petition praying for affirmative relief. A demurrer to this plea was sustained, she amended, another demurrer was sustained and she again amended, upon the sustaining of a demurrer to her final amended plea. She refused to further plead; she asked that proceedings be suspended, pending an appeal to this court. This suspension of proceedings was denied, and judgment on the pleadings was entered.

For her cross petition the defendant alleged in substance, that she was the owner of, in her own right, as her sole and separate estate, the lands, in controversy. She alleged facts to show her title originally, but as the fact that at a certain date she was the owner, is not in issue, these facts are not material. She alleged that she and her co-defendant W. B. Adkins were, and had been for many years, hus-

band and wife. That prior to February 23, 1907, the date of the mortgage, she and her husband executed a certain deed to Jake F. Arnold the mortgagor concerning the lands in suit. She sets up this deed and its acknowledgment in full as part of her cross petition. She alleges she signed the deed as the wife of said *do*-defendant. That by its terms it shows she merely relinquished dower in the lands. She alleges that her husband, having no interest in the land, his deed conveyed nothing. That her relinquishment of dower in the deed conveyed nothing because she, being the owner of the land, had no rights of dower to convey. That, therefore, the deed conveyed nothing to Jake F. Arnold, and his mortgage to Henry C. Arnold, conveyed nothing. That the deed and mortgage are void and passed no title, etc., and are clouds on her title, etc., prays for cancellation, etc., and equitable relief.

90 By sustaining the demurrer to defendant's answer and cross petition, the court below held that the deed set up in the cross petition did convey the title to the land to Jake F. Arnold, as a matter of law, and that, therefore, Jake F. Arnold could make a valid mortgage on the land to the plaintiff. While there are several questions raised in this case, the final rights of the parties will be determined by the construction of the deed and its acknowledgment, as pleaded by defendant. Before commencing the consideration of this decisive feature of the case, however, we will notice certain questions insisted on by defendant. It is alleged as error of the court, the refusing to suspend all proceedings, upon sustaining the demurrer, until defendant could prosecute an appeal. While it is true that under the Statutes there are cases in which an appeal will lie without a final judgment in the case. Wesley et al. vs. Diamond et al., 26 Okla. 170. Yet in this case, when the demurrer was sustained and defendant elected to stand on her pleading, and refused to plead further, she was before the court in default, and the plaintiff was entitled, on motion, to judgment. In Pugh vs. Stigler, 21 Okla. 854, it is said:

"Where the allegations of the complaint as amended are admitted in the answer, and affirmative matter pleaded, and the same filed as an answer and cross complaint, on a motion for judgment on the pleadings, the same should be rendered for plaintiff if the allegations of the cross-complaint are sufficient to sustain a judgment for defendant."

The defendant also urges that the sustaining of the demurrer was error, because her answer contained a general denial. But in this case while this is true, yet her affirmative averments are inconsistent with the general denial, and admit all the allegations of plaintiff's petition, in so far as they become material to her, in the event the court finds the law contrary to her assertion of it, and that

91 the deed she admits executing, did, in law, pass title to the lands to the mortgagor. The question of the validity of the mortgage as between the parties to the mortgage, was not material to her, if, as a matter of law, she had conveyed all her title and estate in the lands, and this is shown by her cross petition. Her pleading

must be considered and construed as a whole, and when so considered the court did not commit error in sustaining the demurrer on this ground, if it was correct in its construction of the deed set up, which main question we will now proceed to determine.

To properly determine the questions arising in this case it is necessary to inquire into and determine the state of the law, in Indian Territory, prior to statehood, relative to the conveyance of real property, and especially of the real property of married women. It is contended in this case that the statute of Arkansas, requiring the husband to join in the deed conveying the wife's land, was in full force, unmodified, as found in section 659 of Art. 27 of Mansfield's Digest; and that being so in force, that a certain line of the decisions of the Supreme Court of that state was brought over with it, and became binding on the Courts of Indian Territory. This line of decisions announced perhaps, the most rigid rules, regarding the mode and acknowledgment of conveyances, of any of the states, with perhaps the exception of Virginia and West Virginia. In these decisions a strict and literal compliance with the prescribed forms, and even the use of statutory words, was required to pass title. After the adoption of the Arkansas Consittution in 1874, these rigid rules of construction were in large measure relaxed, and
92 many of the earlier cases overruled or the principles announced in them abandoned, and a new rule of decision became the settled law. To determine which of these lines of decisions should guide the court, it will be necessary to go somewhat at length into this matter Sec. 659, Art. 27 M. D., which requires the husband to join in the execution of a married woman's deed to her lands, is a provision found in the first Statutes of that State. Sec. 10 Chap. 31, Stat. 1836; it was continued in all subsequent statutes and in Sec. 849 Gantt's Digest 1874. In the Constitution of 1868 Arkansas enlarged the rights of married women and gave them in Sec. 6 Art. 12, the right to devise or bequeath their real estate the same as though a femme sole. In the Constitution of 1874, the rights of married women were still further enlarged, and Sec. 7, Art. 9, thereof gave them the right not only to devise or bequeath, but also to convey their real estate the same as though a femme sole. After the adoption of this cons-itutional provision, the legislature adopted it, (Sec. 7 Art. 9) in hac verba, as a law, Mch. 8th, 1883, and it is Sec. 4621, Art. 104 M. D. (Ark.). This was the state of the law of Arkansas when its statutes (Mansfield's Digest) were compiled in 1884, and while the ancient provision of the law, requiring the joining of the husband in a married woman's deed was incorporated in that compilation, as Sec. 659 Art. 27, yet it had been modified, so as not to require such joining of the husband in the conveyance of the wife's land by both the sections of the constitution of 1874, supra, and by the later Act (Sec. 4621) of the Legislature; and therefore, although incorporated, without modification in Mansfield's Digest, it was not
93 the law of that state, after the adoption of the Constitution of 1874. And was therefore not a law of Arkansas at the close of the Legislative Session of 1883. An unbroken line of de-

cisions of the Supreme Court of Arkansas hold that after the adoption of the Constitution of 1874 this section in so far as it required husbands to join in their wife's deed to her lands, was not in force, as to lands acquired, or where the marital relations began, after the adoption of the constitution. Roberts vs. Wilcockson 36 Ark. 355; Holt vs. Moore 37 Ark. 148; Donahue vs. Mills, 41 Ark. 421; Bryan vs. Winburn 43 Ark. 28; Crisco vs. Hambrick 47 Ark. 325.

On May 2nd, 1890, Congress passed an Act to enlarge the jurisdiction of the United States Courts in the Indian Territory, and for other purposes (Chapter 182, 26 U. S. Stat. Page 94) Sec. 31 of this Act provided:

"That certain general laws of the State of Arkansas in force at the close of the session of the general assembly of that State of eighteen hundred and eighty three, as published in eighteen hundred and eighty four in the volume known as 'Mansfield's Digest' of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this Act etc., * * * are hereby extended over and put in force in the Indian Territory, until Congress shall otherwise provide, that is to say, the provisions of the said general statutes of Arkansas relating * * * to married women, chapter one hundred and four."

The first paragraph of article 104 as thus put in force is:

"SECTION 4621. The real and personal property of any femme covert in this State, acquired either before or after marriage, whether by gift, grant, inheritance, devise or otherwise, shall, so long as she may choose, be and remain her separate estate and property, and may be devised bequeathed or conveyed by her the same as if she were a femme sole; and the same shall not be subject to the debts of her husband."

That a married woman could convey her real estate under this provision, as though she were single, is not disputed up to 1903, when congress passed another act (32 U. S. Stat. L. Page 841) putting in force in Indian Territory Chap. 27 Mansfield's
94 Digest. The adopting words are:

"That chapter 27 of the Digest of the Statutes of Arkansas known as Mansfield's Digest of Eighteen hundred and eighty four, is hereby extended to the Indian Territory, so far as the same may be applicable and not inconsistent with any law of congress etc."

In Chapter 27, supra, are the following sections:

"SEC. 648. A married woman may convey her real estate or any part thereof by deed of conveyance, executed by herself and her husband and acknowledged and certified in the manner hereinafter prescribed."

SEC. 659. "The conveyance of any real estate by any married woman, or the relinquishment of dower in any of her husband's real estate, shall be authenticated and the title passed, by such married woman voluntarily appearing before the proper court or officer, and in the absence of her husband declaring that she had of her own free will executed the deed or instrument in question, or that she had signed the relinquishment of dower for the purpose therein

contained, and set forth without compulsion or undue influence of her husband."

Mr. Bledsoe in his book entitled Indian Land Laws at page 108 says:

"Section 4621 is copied from the constitution of Arkansas of 1868 (1874) previous to 1868 (1874) both under the cons-itution and the statutes the conveyance by a married woman of her property had to be joined in by her husband. By mistake of the digester the old provision in the chapter on conveyances with reference to the acknowledgment of a married woman in force prior to the adoption of the constitution of 1868 (1874) was continued in the statute. It is sections 659 etc." After quoting the section he continues: "The chapter containing this section having been put in force in 1903 subsequent to the extention of the chapter on married women over the Indian Territory, some question has arisen as to whether a conveyance by a married woman is valid where not joined in and acknowledged by her husband. * * * It is not believed that congress intended to deprive a married woman of the liberty given her under the married woman's act and recognized by every other law, in force in the Indian Territory at that time. Such a conveyance made by a married woman and acknowledged as a femme sole would probably pass title to her property."

It may be also mentioned that the chapter 104 relating to married women was incorporated in the compilation of laws in general use, in Indian Territory Statutes (1899) and chapter 27 was not in that compilation. We think that it is beyond dispute that the bar of Indian Territory, almost unanimously held, and advised
95 clients, that a married woman could convey her lands, under the married Woman's act, the same as if she were single. Whether this opinion was the result of careful comparison and analysis of the conflicting provisions, or was influenced by the fact that one provision was in the Indian Territory Statutes and the other was not, it is needless to enquire; but it is probably true that hundreds if not thousands of titles in the cities and towns of Indian Territory have been acquired and transferred under this construction, involving an enormous sum of money in the aggregate and covering a period of many years. We believe it would be exceedingly unfortunate, if this court should be compelled to hold, on this proposition, with the views of plaintiff in error. Such holding would result in wide spread confusion, and often in disaster, among the holders of titles in the East half of the state and to do so we would have to feel it to be the unanswerable demand of the law. We do not find it necessary, however, for such considerations to enter into the matter. Congress, early in its enactment of general laws to govern Indian Territory, seems to have caught the spirit of the times, and struck from married women the shackles of the common law limitations and restrictions. Most of the states of this union from which the congress is gathered, have enlarged the rights and legal status of married women; and it would seem strange that the congress after having accorded these rights and permitting them to continue, and a rule of conveyance and of property to arise, dur-

ing a period of more than twelve years, should intend to suddenly reverse its policy, and place the married women of Indian Territory again under common law disabilities. And this, too, when the States from which the congressmen come, are yearly trav-
96 elling farther in the opposite direction.

We believe it was the intention of Congress to provide for the people of Indian Territory as body of harmonious laws under which they should live and conduct business. In the importation of Statutes from other states, especially when brought over at different times, the very size of the transaction and the number of the provisions, makes it almost unavoidable that conflicts occur. For this reason, a clause providing for harmony is always inserted. As in this instance. This chapter 27 was brought over and put in force—"so far as the same may be applicable and not inconsistent with any law of Congress etc."

It was inconsistent with regard to the matters discussed. It either repealed, by implication the prior law, or it was intended to be brought over in so far as it harmonized with the prior laws. We believe the latter to have been the intention of Congress, and that sections 648 and 659 were brought over so modified as not to affect the conveyance by a married woman of her lands. To hold otherwise would overturn a rule of conveyancing in force for years; would destroy titles and result in disastrous confusion. This being true, the decisions of the Supreme Court of Arkansas, construing these identical laws, both in the Statutes at the same time in conflict, and rendered by that court prior to the date of their adoption here, should furnish a guide and the rules, under which the deed in this controversy must be measured and tested.

So far as this case is concerned, it stands admitted that on the date of the execution, of the deed, by defendant to Jake F. Arnold, to the lands conveyed in his mortgage to plaintiff Henry C. Arnold that defendant Martha Adkins was the owner of the lands
97 as her separate estate, in her own right. A construction of this deed is necessary. And if our conclusions are correct on the question, of what law was in force in Indian Territory prior to statehood, then this deed will have to be construed by considering its terms in the light of the decisions of Arkansas, rendered after the constitution of 1874 and prior to 1884. The deed with the acknowledgment follows:

"*Warranty Deed with Relinquishment of Dower.*

Know All Men by These Presents:

That W. B. Adkins of Yeager, Indian Territory, and Martha Adkins, his wife, party of the first part, in consideration of the sum of Fifteen Hundred Dollars to me paid by Jake F. Arnold, Cashier of — Yeager, Indian Territory, party of the second part, the receipt whereof is hereby acknowledged, do hereby bargain, grant, sell and convey unto said Jake F. Arnold, Cashier of Farmer's Bank of Yeager, I. T., his heirs and assigns, a certain lot, parcel or tract of

ground situated in the Creek Nation, Indian Territory, described as follows, to-wit:

North Half of the Southeast Quarter of Section 13, Township 8 North, Range 9 East, of the Indian Base and Meridian in the Indian Territory, with all privileges and appurtenances thereto belonging. To have and to hold the aforegranted premises unto the said party of the second part, his heirs and assigns in fee simple forever. (Here follows general covenants of warranty by W. B. Adkins, and clause relinquishing dower by Martha J. Adkins.)

Witness our hands and seals on this the 18th day of January, 1907.

[SEAL.] W. B. ADKINS.
[SEAL.] MARTHA J. ADKINS.

UNITED STATES OF AMERICA,
Indian Territory, Western District, ss:

On this the 15th day of January, 1907, personally appeared before, me a Notary Public within and for the above named district, W. B. Adkins, to me personally well known as the person subscribing the foregoing instrument and acknowledged that he has subscribed and executed the same for the consideration and purposes therein set forth as his free, voluntary act and deed. And I further certify that on this day also voluntarily appeared before me, the undersigned Notary Public, Martha J. Adkins, the wife of the said W. B. Adkins, well known to me as the person whose name appears upon the within and foregoing deed, and in the absence of her said husband declared that she had of her own free will, signed the relinquishment of dower therein expressed, for the purposes and
98 consideration therein contained and set forth without compulsion or undue influence of her husband.

Witness my hand and seal as such Notary Public on the day and year first above mentioned.

CHAS. BURTON,
Notary Public."

There is no charge of fraud, deceit or inadequacy of price made in this case.

A case practically identical with the one at bar, was decided by the Supreme Court of Arkansas, in the case of Bryan et al. vs. Winburn et al., and is reported in volume 43, page 29, Ark. Repts. In that case one Bell, on March 9th, 1877, conveyed certain lands to Mrs. Winburn. Mrs. Bell joined in the granting clause of the deed, which contained, likewise a clause relinquishing her dower. In the acknowledgment the notary certifies only to the relinquishment of dower on the part of Mrs. Bell. The title to the land was in Mrs. Bell. This is the exact situation in the case at bar. Mrs. Adkins the owner of the land joined her husband in the granting clause; a relinquishment of dower clause is in the deed; the acknowledgment recites only the relinquishment of Mrs. Adkins' dower. In

he case last cited Bryan et al. vs. Winburn et al., the syllabus is as ollows:

"Since the adoption of the constitution of 1874 a married woman an convey her separate property the same as if she were single; nd where she joins her husband in a deed of her land, and also elinquishes dower, the deed will convey the fee, though she ac- knowledges only the relinquishment."

In the body of the opinion it is stated:

"It is further contended that the deed from the Bells and the ertificate of acknowledgment not being in the form prescribed for he conveyances of the wife's estate, are so defective as not to vest itle in Mrs. Winburn, according to the doctrine of Little v. Dodge, 32 Ark. 453, and Wentworth v. Clark, 33 Id. 432. Perhaps this ob- jection has no great force coming from the appellants, who do not claim through the Bells and who purchased with notice of Mrs. Winburn's rights in the premises, whatever they were. But the deed was executed since the adoption of the constitution of
99 1874, which enables a married woman to convey her separate property the same as if she were single. Mrs. Bell did join in the operative words of grant, as well as relinquish dower, which last estate, of course, she had not in her own lands. And although her acknowledgment is defective, yet as between her and her grantee, the deed might be good without acknowledgment, or vest an equita- ble title. Stirman v. Cravens, 29 Ark. 548; Jackson v. Allen, 30 Id. 110; Roberts and wife v. Wilcoxon & Rose, 36 Id. 355; Donahoe v. Mills, 41 Id. 421."

An examination of this deed shows that Mrs. Adkins, the sole owner of the land, joins in the operative words of grant, usually designated as the granting clause. This clause is carelessly drawn, and uses both the singular and the plural in the designation of par- ties. It speaks of both as "party of the first part." Recites the con- sideration as "to me paid" and then in the actual words of grant says "do hereby bargain, grant, sell and convey." Mrs. Adkins participates in the "Habendum" clause in the body of the deed fol- lowing the words of grant. It is true the covenants of warranty were made by her husband, but the warranties stipulated in this deed were unnecessary to be inserted in it because they were implied by the use of the granting words "grant, bargain and sell" Sec. 639, Mansfield's Digest, Arkansas.

In attempting to arrive at the intention of the parties to this deed we may take into account the situation of the parties at the time it was executed. This land was part of the allotment made in the name of the deceased infant child of the grantors; at the time it was made it is very probable that neither the grantors or grantee had a very clear or correct idea as to whether both parents, or if only one, which of them took title to this land. They did not then have the advantage of the adjudication of this court in regards thereto. And in this situation, it seems reasonable, and comports with the idea of fair dealing between the parties, to believe, that when the
100 purchaser paid $1500.00 for this 80 acres of land, he be-

lieved, and when the husband and wife signed the deed and received into the family the money that they believed that a full transfer of all the legal rights they each had in the land was being accomplished, whatever those rights might be. The insertion of the release of dower was probably a matter of precaution, and to make certain of a full title, in the event the courts later, in construing the question of descent, should hold that the child's lands passed to the father. The parties evidently believed that these lands had passed to the father, in which event the wife had dower, or to the father and mother in equal rights, or to the mother alone. In any event it appears clear that in this deed the parties were trying to provide a vehicle, so comprehensive in its terms as to surely pass all the title each of the parents of the deceased child had, whatever those rights might later be determined to be.

In the light of the Arkansas decisions, and in reason, we believe that the deed in this case was sufficient to pass title, as between the parties and their privies, although not acknowledged in such form as to entitle it to registration under the law in force in Indian Territory. The plaintiff in this case was seeking to foreclose a mortgage given by the grantee of Mrs. Adkins, the deed being good between the grantor and grantee it was good as to the mortgagee. No other deeds or subsequent conveyances are set us. We therefore believe the answer and cross petition of defendant did not state a defense, a cause of action, or grounds for relief as sought, and that the demurrer to same was properly sustained and the judgment of the trial court should therefore be affirmed.

Nov. 18, 1911.—By the Court Adopted in whole.

101 No. 1228.

MARTHA ADKINS, Plaintiff in Error,
vs.
HENRY C. ARNOLD et al., Defendants in Error.

Motion for Rehearing.

102 In the Supreme Court of the State of Oklahoma.

MARTHA ADKINS, Plaintiff in Error,
vs.
HENRY C. ARNOLD et al., Defendants in Error.

Petition for Rehearing.

Comes now the above named plaintiff in error, Martha Adkins, and for grounds of a rehearing herein, charges and avers:

First. That on the 18th day of November, 1911, this Honorable court handed down a decision in the above styled cause adversely to the rights and interests claimed by said plaintiff in error to the lands in controversy therein whereby it was held and so decided

that said plaintiff had no rights or interest in said lands by reason of a deed therefor to Jake F. Arnold, dated the 15th day of January, 1907, executed by her and her husband W. B. Adkins, and wherein it is held that said deed was that of plaintiff in error and conveyed all her rights in said lands, even without a proper acknowledgment thereof, and that the law as it existed at the time of making said deed permitted married women to make and execute deed to their separate real estate as a feme sole; and that there was no charge of fraud, deceit or inadequacy of consideration in the making of said deed etc.

Second. That said decision section- 648 and 659 of chapter 27 of Mansfield's Digest of the Laws of Arkansas of 1884, put in force in Indian Territory, by an act of Congress of Feb. 19, 1903 (32 U. S. Stat. L. 841), entitled "An Act Providing for record of deeds and other conveyances and instruments of writing in Indian Territory, and for other purposes" are inconsistent with section 4621, chapter 104 of Mansfield's Digest, which was in force prior thereto, and that to the extent of such inconsistency said sections 648 and 659 were not in force in the Indian Territory prior to statehood;

103 Third. That by said decision this court also held that under the laws in force in Indian Territory prior to statehood, a married woman could convey the title to her real estate, the same as if she were single; and where she joined her husband in a deed of her land, and also relinquished her dower, the deed will convey the fee, though she acknowledges only the relinquishment of dower; but that such acknowledgment of relinquishment of dower only is not sufficiently acknowledged to entitle*d* such deed to record, but is sufficient, as between the parties or privies to convey the fee;

Fourth. That in said decision it is maintained that the affirmative averments of the plaintiff in error presented in her answers and cross-petition are inconsistent with her general denial therein contained; and that "a married woman could convey her real estate under its provision (Sec. 4621), as though she were single, is not disputed up to 1903, when Congress passed another act (32 U. S. Stat. L. Page 841) putting in force in Indian Territory chap. 27 Mansfield's Digest" (which proposition was strenuously contended against by the plaintiff in error, as may be seen in her brief from pages 37 to 41 inclusive);

Fifth. That in said decision it is stated, page 12 thereof, that "There is no charge of fraud, deceit or inadequacy of price made in this case;" whereas in fact and in truth this plaintiff in error in her amended answer to her amended answer and cross-petition, made the following charges, to-wit:

"Comes now the defendant Martha Adkins by counsel on this the 21st day of July, 1909, and in compliance with an order herein made at this term of this court, and as an amended answer to her former amended answer and cross-petition herein filed at a former term of this court, charges and avers that, at no time or place, or in any way or manner whatever, has she, the said defendant, received any consideration whatever for said lands mentioned and described

in her said former amended answer and cross-petition here-
104 inbefore filed in this cause or for the execution of said deed for said lands therein mentioned; nor has she, said defendant, at any time or place or in any way, form, or manner whatever, received, directly or indirectly, any part or portion of the said consideration of fifteen hundred dollars mentioned in said deed as the consideration for the lands therein described; nor has she, the said defendant, at any time or place, or in any form or manner, either directly or indirectly, received any consideration of any kind, character or description whatever, for the execution of said deed or for the lands therein and in said amended answer and cross-petition mentioned and described, or by virtue of said deed having been so executed and said lands having been thus attempted to be conveyed by said deed or through its force and effect"; and that said charges and averments were not mentioned, referred to, or considered by the court in rendering said decision, and all of which were on the demurrer thereto, taken as true and stand as fully established in the record of this case.

Sixth. That, at the close of the 3rd paragraph of said cross-petition, said plaintiff in error, therein charges and avers:

"That this defendant has at no time or place made, executed or delivered any deed or conveyance of any kind to said Jake F. Arnold or any one else, for said lands thus mentioned in said petition or any part thereof; and that this defendant is now and ever has been since said lands were thus segregated as aforesaid, in the full and complete possession of said lands and claims the same as her own in fee simple"; and all of which charges and averments were taken as true and fully established on said demurrer and motion for judgment, but none of which were mentioned, referred to or considered by the court in rendering said opinion and decision.

Seventh. That in the 4th paragraph of said cross-petition of plaintiff in error, she further charges and avers:

105 "That prior to the 23rd day of February, 1907, said W. B. Adkins pretended to make and execute to said Jake F. Arnold a deed for said north half of the south east quarter of section thirteen, township eight north, range nine east, in Hughes county, and this defendant signed said deed as the wife of said W. B. Adkins for the purpose only of relinquishing her dowwer in said lands described in said deed, when, in fact said W. B. Adkins had no right, title or interest in said lands, and this defendant then or at any other time had any dower therein but had, held and owned the fee simple title thereto"; and that all said averments were taken as true, on said demurrer and motion, but were not mentioned or considered by this court, in said decision; and being taken as true and thereby fully established; it was perfectly competent, and we consider the duty, of the trial court to have reformed said deed under the prayer of general relief prayed for by plaintiff in error in her cross-petition, even if it had concluded that the deed as it stood on its face, operated as the deed of plaintiff in error, and passed the title to said lands. It being charges that she signed said deed for the purpose of relinquishing the dower only; that she

received no consideration whatever, neither directly or indirectly; that she was then and ever after the segregation of said lands in the full and complete possession of said lands; and claiming the same as her own in fee simple, and that said deed was that of said W. B. Adkins,—all, all of which were admitted by said demurrer and motion to be true and correct, there remains no doubt of the power of the trial court to correct this deed and protect the title of the plaintiff in error; but none of these matters were mentioned or considered by this court in said decision.

Eighth. That the answer and cross-petition of the plaintiff in error show upon its face that the plaintiff in error is a Creek citizen and was so enrolled and that the lands in controversy are a part of the Creek Domain and were allotted because of said child Othello, under the laws of Congress therein mentioned, and also set out in haec verba the deed in controversy which bears date the 15th
106 of January, 1907; that, upon said demurrer, all such facts so alleged are taken as true and fully established. It, therefore, appears of record in this case that said deed to said lands was absolutely null, void and ineffectual for any purpose and failed to pass title to said land but left the same in the plaintiff in error, as set forth in the assignments of error herein presented, not only because of the defective execution of said deed, but likewise because said deed was attempted to be made in violation of the original Creek Treaty and also an Act of Congress passed on the 30th day of June, 1902, and entitled "An Act to ratify and confirm a supplemental agreement with the Creek Tribe of Indians, and for other purposes" (32 Stat. L. 500-, and also another act of Congress, passed on the 26th day of April, 1906, entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," by the terms and provisions of which said Acts, the plaintiff in error was prohibited from alienating said lands for a period of five years from and after the passage of said Act of June, the 30, 1902; and it therefore follows that said pretended deed of January the 15, 1907, came within the restrictions therein provided in said act, and said deed is void for all purposes and to every extent; that while said answer and cross-petition does not disclose whether the plaintiff in error is an Indian or Freedwoman or colored person, still said restrictions extended to each class alike and their heirs; and if she was a freedwoman and said lands are held to be inherited lands, said deed would be absolutely void under the decision of this court in the case of Parkinson vs. Skillen (not yet reported), and if an Indian woman, it would be void under the same decision; Barnes vs. Stonebraker, 113 Pac. 903; Howard vs. Farrar, 114 Pac. 695 and others; yet this condition and feature of the case was not mentioned, referred to or considered by this court in rendering said decision.

Ninth. That said answer and cross-petition alleges that plaintiff in error was a Creek citizen and so enrolled and received her
107 allotment in said Creek Nation, which said facts are taken as true on said demurrer; and being true and correct, brought her strictly within the restricted provisions of said Acts of Congress

above-mentioned and entitled to all the protection of said acts, and each of them; and if a full blood Indian (which does not directly appear from the record to what class she belonged), her said deed to said lands (no matter whether deemed inherited lands or those of purchase), would have had to have been approved by the Secretary of the Interior before it became effectual, but which fact does not appear from the record but the record does show she is a Creek citizen and must fall within the protected class; and if, as a matter of fact, she was not within such class and said protection or her deed had been approved by said Secretary, the burden of this proof was on the plaintiff Arnold, but none such is in the record, and the controlling presumption in the case is that she was fully protected by said Acts and that said deed was therefore null and void for all purposes whatever and passed no title but the same remains in the plaintiff in error after the deed the same as before; but none of said matters were mentioned, referred to or considered by this court in said decision.

Tenth. That after the answer and cross-petition showed that the plaintiff in error was a Creek citizen and so enrolled; a member of said tribe and had received and been allotted her own allotment, and that the lands in controversy were also a part of the Creek domain, all arising under said Creek treaties mentioned in said cross-petition, it was incumbent upon the defendant in error, Henry C. Arnold, to show by a proper and competent reply to said answer and cross-petition that plaintiff in error was not in the restricted class provided for in said Acts; or had had her restrictions removed; or said deed approved by said Secretary; but no such reply was ever filed, and he interposed his demurrer thereto and motion for
108 a judgment instead; and said facts being so alleged they are taken as true and correct; but all such matters are overlooked and not considered by this court in said decision.

Eleventh. That after said answer and cross-petition showed that said plaintiff in error did not make, execute or deliver a deed or conveyance to said Jake F. Arnold or any one else; that she had never received any consideration whatever for said deed or lands; that she signed said deed as the wife of said W. B. Adkins for the purpose only of relinquishing her dower in and to the said land; and all the while even up to the day of trial and *and* ever after said lands were segregated, she held the full and complete possession of said lands and claimed the same as her own in fee simple, as so alleged therein, it was again incumbent upon said defendant in error to file a proper and competent reply thereto either denying said statements or showing a condition of facts which would make him an innocent purchaser under said mortgage; but he did not do so, or attempt to do so, but filed said demurrer and motion for a judgment which not only admitted the facts so stated but established that he was not an innocent purchaser; for she so alleges that she was in possession of said lands all the while and claiming them as her own in fee simple and had not made, executed or delivered any deed or conveyance to Jake F. Arnold or any one else, and had received no consideration what-

ever for said lands or deed, but none of such matters were mentioned, referred to or considered by this court in said decision.

Twelfth. That, in short, the record in this case shows that the plaintiff in error never received any consideration whatever for said lands or said deed; that said deed was never delivered by plaintiff in error to Jake F. Arnold or to any one else; and that she has ever remained in the possession of said lands both before and after said deed was so made, and is now in the possession thereof; and that, therefore, there was no consideration whatever for said deed and of all of which said Henry C. Arnold had complete notice from the fact that plaintiff in error was all the while in the possession
109 thereof; but none of such matters were mentioned, referred to or considered by this court in said decision.

Thirteen. That, on page 4, it is stated in said opinion that "It is alleged as error of the court, the refusing to suspend all proceedings, upon sustaining the demurrer, until defendant could prosecute an appeal. While it is true that under the statutes there are cases in which an appeal will lie without a final judgment in the case. Wesly et al. vs. Diamond, (which in fact was an appeal not upon a demurrer at all but on an order striking material parts of the petition), 26 Okla. 170. Yet in this case, when the demurrer was sustained and defendant elected to stand on her pleadings, and refused to plead further, she was before the court in default, and the plaintiff was entitled, on motion, to judgment, "citing Pugh vs. Stigler, 21 Ok. 854.

But on this feature we respectfully submit that Sec. 4733 of W. S. emphatically provides that an appeal may be taken from an order sustaining or overruling a demurrer, and such appeals thereby become legal rights of which no trial court has the power to deprive the poss-or thereof; and that when the plaintiff in error elected to appeal from said order and then and there so notified the court by asking it to suspend further action in order to permit her to take such appeal, the trial court did not possess the arbitrary power of ignoring her legal rights thus provided for in the very statute of the state, and as arbitrarily render judgment on the pleading then made up, on the motion of plaintiff for judgment; nor could she under such circumstances be in default; for she was there obeying and demanding the express provisions of the statute regarding her rights, and it was for the appellate, not the trial court, to determine the merits of said demurrer and prior pleadings therein, before a final judgment was rendered in the case, and then she could determine what other pleadings she would file, and under such conditions neither Wesley et al vs. Diamond nor Pugh vs. Stigler are applicable to the case at bar.

110 Again, let me kindly call the attention of the court to the significant fact that in each and every answer of the plaintiff in error there was a general denial of every thing set up in said petition except that was admitted in the subsequent part of the answers but no where does she admit the execution of the note, mortgage and debt thus sued upon, and set up in that petition, or the

lien of said mortgage or right to foreclose the same as to the lands in controversy. These matters, therefore, became disputed facts arising out of the pleadings themselves. If they did not exist then of course the plaintiff below had no right to be interferring with said lands claimed by plaintiff in error, and if they did exist, then surely when they were flatly denied in her answer, it was incumbent upon the plaintiff below to establish such facts by competent proof before he was entitled to a judgment taking away the lands claimed by plaintiff in error; but no such proof was ever offered, but instead he moved for a judgment in the very face of all these disputed facts which went to the very gist of his right of action, even if it should afterward be held that the deed to Jake F. Arnold was valid; for she was disputing the validity of the deed and the right of Henry C. Arnold to subject the lands to the payment of the debt he was claiming Arnold brought her into the case himself and can not complain that she made defense to his action; nor can he even attempt to take advantage of the fact that her answer and cross-petition was not verified; for he expressly waives the verification which makes it the same as to him as if it had been verified. Where there are disputed facts at issue in a case, it is highly improper to give judgment upon the pleadings, as was done in this case, Moore v. Murry et al. (1904) 75 Pac. 515; Nolen vs. Owens, 74 Pac. 954; Maffett vs. Oregon &c. R. Co. 80 Pac. 489; Nudd vs. Thompson, 34 Cal. 39; Amader vs. Butterfield, 51 Cal. 526; Craig vs. Bateman, 49 Cal. 71; Johnson vs. Manning, 3 Idaho 352; Bote vs. Vandament, 67 Cal. 332; Widmer vs. Martin, 87 Cal. 88; Hastings vs. Bank of Longmont, 4 Colo. App. 419; Walling vs. Brown, 72 Pac. 960, (Idaho); Roberts vs. Colorado Springs & I. Ry. Co., 101 Pac. 59; Phenix vs. Bijilich, 30 Nev. 257; Shuler vs. Allam, 45 Colo. 372; Cobb vs. Wm. Kenefick Co., 23 Ok. 440; Jury on Adjudicated Forms on Plead. & Prac. page 1885; and my brief in George Washington vs. Charles W. Miller, submitted to this court on the 14th of November, 1911, where such matters are discussed in that case.

111

This motion for judgment on the pleadings and the judgment of the trial court are further confronted with the fact that, in her cross-petition the plaintiff in error denies, or rather alleged, that she has never made, executed or delivered any deed or conveyance to said Jake F. Arnold or any one else; for said lands; that she received no consideration for same; that she signed said deed simply for the purpose of relinquishing her dower only; and was then and ever has been in the possession of said lands. All such facts so alleged were admitted both by said demurrer and motion for judgment on the pleadings; and surely if it be true that Henry C. Arnold has no note, mortgage or debt secured on said lands, as so denied by the plaintiff in error in her answer; and that she never made or delivered said deed or any deed or conveyance to Jake F. Arnold or any one else for said lands, and has received no consideration for the deed or lands but held possession of said lands all the while (which is constructive notice to all the world, Henry C. Arnold included, that she claimed the lands), and signed said

deed only for the purpose of alleging her dower, etc. as so charged, then said decree so made in favor of said Arnold on said demurrer and motion for judgment on the pleadings, was surely plainly wrong, and should be reversed; and the case remanded for dismissal.

Fourteenth. That, on page 7 of the opinion, it is insisted that chapter 104 of the Statutes of Arkansas as known in Mansfield's Digest is the law of this case as to the mode of executing deeds of married women for their separate real estate, and point out that the clause putting in force chapter 27 thereof, was put in force
112 "only" so far as the same may be applicable and not inconsistent with any law of Congress"; and that sections 648 and 659 thereof were inconsistent with section 4621 which is section 1 of ch. 104 above mentioned. But let me kindly call the court's attention to the fact that the act of Congress which put the several statutes of Arkansas in for- in 1890, among which was said chapter 104, put them in force in Indian Territory only so far as locally applicable and not inconsistent with said Act etc—in the language of the act itself—"which are not locally inapplicable or in conflict with this act." When said statutes were put in for- in said territory on the 2nd of May, 1890, the title to the lands in said territory was in said tribe*d*; and the several member- thereof had no interest in severalty in said lands nor did any other human individual. Adams vs. Wallace, 143 Fed. 716; Ligon vs. Johnson 164 Fed. 670; Cherokee Nation vs. Journeycake, 155 U. S. 196; Stephens vs. Cherokee Nation, 174 U. S. 445; Delaware Indians vs. Cherokee Nation 193 U. S. 136; and Fleming vs. McCurtain et al. 215 U. S. 56, 54 Law ed. 88, but were public lands, Stephens vs. Cherokee Nation, 174 U. S. 445, and Cherokee Nation vs. Hitchcock, 187 U. S. 294. So the chapter relied upon could not possibly have been applicable to the lands of married women or any other person at the time it was put in force on the 2nd day of May, 1890; for they had no lands at that time in said Territory. If the act did not become operative as to the real estate of married women on the 2nd day of May, 1890, then it is too plain that it could not become operative after that date when such allotments were made, without another act of Congress putting the same in force as to such allotment. It will not be contended that Congress ever put ch. 104 back in force again until it had so put ch. 27 in force on the 19th day of February, 1903. Consequently, chapter 104 never applied at all to the lands of married women in Indian Territory; and was, therefore; not an act of Congress as to such lands at all at any time, consequently, when Congress put in force chapter 27 of said statutes on the 19th of February, 1903, it did not conflict with any
113 other act of Congress, and therefore was not inconsistent with any such act; but stood as the only law governing the sale, disposition and conveyance of the real estate of married women of said Territory, but this feature seems to have been overlooked by the court in arriving at its decision in this case; Let me further call the attention of the court to the very*s* significant fact that at the time Congress put chapter 27 of force in Indian Territory on the 19th day of February, 1903, every member of the Five Civilized

Tribes was prohibited from alienating his lands of all kinds, and had always been so restricted before that date and for many years thereafter and many of them are still restricted. This would seem to be opposed to the line of reasoning on page 9 of this opinion; and indicate that it was the express purpose of Congress to leave "the shackles of the common law limitations and restrictions" not only on the married women but the men and single women as well; but this is a feature which indicates very strongly the intention of Congress that such conveyances should not be made so easily as provided for in Sec. 1 of ch. 104, and passed chapter 27 as the law of conveyancing in said territory; but this is overlooked in the opinion of the case; and the fact that such restrictions were placed upon all such lands and kept there by these acts of Congress pertaining to the allotment of the lands in severalty but in ample time provided this chapter 27 whose terms are the very reverse of these of ch. 104, would indicate an intention to restrict rather than loosen the means of such conveyance.

Let me also call the attention of the court to the further fact that chapter 20 of the said Statutes of Arkansas, which pertains to the common law of England, was also put in force in Indian Territory by the same Act of Congress which spread chapter 104 over said territory, and it is claimed that the common law was again put in force in said territory by another act of Congress passed in 1897. If chapter 104 has the effect to empower married women to sell and convey their real estate, then there is a conflict in the very act itself on this subject as to the manner of conveying the
114 same; for, at common law, a married woman could not convey her real estate as a feme sole, but the same must be done in the way and manner provided by the common law, which is pointed out in the brief of counsel for the plaintiff in error filed in this case; but this matter is also omitted from the consideration and opinion of this court in its decision in this case.

For the reasons aforesaid, plaintiff in error kindly asks that she be granted a rehearing in this cause by this court, and that said matters be fully considered and passed upon by the court that she may have the complete benefit of the same and each proposition thereof in all respects both in this court and in the Supreme Court of the United States, if it is deemed advisable to so appeal the same to that court; and that she be given all such other relief herein as the nature of the case may require under her answer and cross-petition herein filed, or which to equity may seem proper.

November 27, 1911.

LEWIS C. LAWSON,
Counsel for Plaintiff in Error.

115

No. 1228.

MARTHA ADKINS, Plaintiff in Error,
vs.
HENRY C. ARNOLD et al., Defendants in Error.

To said Henry C. Arnold, or to O. A. Morton, and J. R. Witty, attorneys of record in said case:

Take notice that on the 28th day of November, 1911, the above named plaintiff in error will file her motion or petition in the Supreme Court of the State of Oklahoma, for a rehearing in said case on the judgment rendered in said case by said court on the 18th day of said month.

LEWIS C. LAWSON,
Counsel for said Plaintiff in Error.

I, O. A. Morton, of counsel for said defendants in error in the above styled case, hereby accept service of the above notice on this the 28th day of November, 1911.

OSBORN A. MORTON,
Counsel for said Defendants in Error.

Above notice received this morning, 11-28-1911.

Postmarked yesterday at 5 p. m. O. A. Morton. (Filed December 2, 1911. W. H. L. Campbell, Clerk.)

Petition for rehearing endorsed as follows: No. 1228. Martha Adkins v. Arnold. (Filed November 28, 1911, W. H. L. Campbell, Clerk.)

116

Supreme Court Proceedings.

No. 1228.

MARTHA ADKINS, Plaintiff in Error,
vs.
HENRY C. ARNOLD et al., Defendants in Error.

And now on this day it is ordered by the court that the mandate of this court in the above cause, be, and the same is hereby stayed. Dated December 2, 1911.

117 Supreme Court, January Term, 1912, February 6th, 1912.—Tenth Judicial Day.

No. 1228.

MARTHA ADKINS, Plaintiff in Error,
vs.
HENRY C. ARNOLD et al., Defendants in Error.

And now on this day it is ordered by the court that the petition for rehearing filed herein be, and the same is hereby overruled.

118 Lewis C. Lawson. H. S. Samples.

Lawson & Samples, Attorneys-at-law, Rooms 11 and 12 Over American National Bank.

HOLDENVILLE, OKLAHOMA, *Feb. 28th,* 1912.

W. H. L. Campbell.

DEAR SIR: When up there last week you said this present term would not close for about three weeks. We want to take an appeal to the Supreme Court of the United States in the case of Martha Adkins vs. Arnold et al., No. 1228; but I am just starting to Chicago to attend some legal matters and may not return in time to perfect such appeal during this present term. So if you please, I wish you would have the court to note on the docket the notice of this appeal or writ of error rather, so as to save citation therein hereafter if possible.

Respectfully,
(Signed) LEWIS C. LAWSON.

(Endorsement:) #1228. Adkins v. Arnold. Notice of Appeal to Sup. C't U. S. Filed Feb. 27 1912, W. H. L. Campbell, Clerk.

119 In the Supreme Court of the State of Oklahoma.

No. 1228.

MARTHA ADKINS, Plaintiff in Error,
vs.
HENRY C. ARNOLD et al., Defendants in Error.

Comes now the plaintiff in error, and for cause hereinafter stated, prays that the motion heretofore made in said cause for a rehearing therein may be reinstated, as provided for in rule X of this court; and for ground therefor states that, in taking writs of error from the state courts of this state to the Supreme Court of the United States, there is a doubt as to when the limitation for such proceedings begins to run, both as to the time to give a supersedeas bond therein and also as to the two years in which the appeal can be taken, which doubt arises, first, in the fact that the Supreme Court of this state, in reversing a case appealed to it, cannot issue execution to carry its decision into execution; but must remand the case to the trial court, under mandate, with directions to that court to enforce its decree or decision in the case, and that such mandate and the full execution thereof by the trial court seems to be necessary to perfect the decision of this court, and therefore absolutely necessary to have been done, before appeals to the Supreme Court of the United States can be taken; and therefore before such limitations would begin to run in any case, and until such limitation begins to run, such appellate proceedings would be premature and liable to be dismissed in said Supreme Court on motion for that

purpose; second, there seems to be no statutory authority or provision, either in the Constitution or Statutes whereby the Supreme Court of this state can affirm a judgment or decree; and the judgment of the trial court in the above styled cause, was affirmed in that case which fact brings such affirmation into consideration both on a rehearing and in the said Supreme Court, which fact also makes such appellate procedure doubly doubtful; and for the benefit of this case and also that such matters may be definitely settled in such cases, your petitioner prays that the order heretofore made refusing the rehearing in this case be set aside and the motion therein re-instated and all such matters carefully considered by this court.

Respectfully submitted.

LEWIS C. LAWSON,
Counsel for Pl'ff in Error.

120 By way of explanation of the motion here made, I wish to state that preparatory to taking this appeal to the Supreme Court, I ordered the transcript on the 19th of March, 1912, which is already made; but ran onto a difficulty which I have not yet been able to solve since getting the papers for the purpose of appealing the case.

The taking cases to the Supreme Court of the United States *from* a State court, there seems to be two well defined proceedings or rather methods which have to be followed according to the conditions of the case, and the laws which govern the Supreme Court of the State from which the case is being taken. If the Supreme Court of a state is vested under the laws of that state with full power to carry its decisions into full force and effect, by execution etc. and retains the record under its own custody after disposing of the case, so that its action in the premises is final and capable of enforcement by the court in the first instance, the writ of error from the Supreme Court runs to the Supreme Court of the State; and the papers necessary for the appeal *is* signed up, allowed etc. either by an associate Justice of the Supreme Court of the United States, or by the Chief Justice etc. of the State Supreme Court. Simpkin's Federal Equity Suit, page 782 etc.; Loveland Appellate Jurisdiction of Federal Courts, page 742 etc.; and in such cases the time both for the appeal and supersedeas begins to run from the entry of the judgment or decision of the state court. Rev. Stat. sec. 1088; Farrar vs. Churchhill, 135 U. S. 609; 34 Law. Ed. 247; Smith vs. Gale, 137 U. S. 615, 34 Law ed. 792; but the granting of a rehearing in the case, prevents the running of the time, Simpkin's Feb. Eq. Suit, page 626 and cases cited.

Now the other line of procedure is that when the Supreme Court of the state sends back the record and its mandate to the trial court to be carried out by that court etc., the writ of error must run to the inferior state court and not the state Supreme Court, and the time of appeal or procedure on appeal does not begin to run until that lower court has entered up the decision of the Supreme Court etc., Polleys vs. Black River Imp. Co., 113 U. S. 81, 28 Law
121 ed. 938; Bronson vs. Railroad Co., 2 Black 524, 17 Law ed. 359; Mussina vs. Cavazos, 6 Wall. 355, 18 Law ed. 810; and

Brooks vs. Norris, 11 How. 204, 13 Law ed. 665; and see specially Green vs. Van Buskirk, 18 Law ed. 245, where it not only adher-s to this line, but also holds under such conditions that

"A judgment cannot be regarded as final until entered in a court in which execution can issue." Other cases might be cited on both lines but I presume for the purposes at hand these will suffice to show where the uncertainty came in in appealing from this court to the Supreme Court of the United States; for our appellate procedure here does not come strictly in either of these classes.

Upon an appeal to this court, if it reverses, modifies etc. the decision appealed from, the court may under sec. 4733 of W. S. render such judgment as it deems proper, or remand it to the lower court to enter up its decision; but in neither case can this court issue an execution for it is therein forbidden. Similar provisions may be seen in sec. 4751 of W. S.; but in all such cases, this court must remand the case to the lower court by special mandate to enter up the same, and execution is to issue from the lower court. So that, in our jurisdiction, the decision of this court is not final and complete until its mandate reaches the lower court and is there entered up etc. But still, the record remains in the Supreme Court all the time. Then to which court must the writ of error run—to this court or to the lower court which finishes up the decree or decision of this court? I am of the opinion it runs to this court; for the purpose of the writ is to bring up the record; but as the decision is not to become final until entered in the court below, I presume the time of appeal in every respect does not begin to run until the mandate of this court reaches the lower court and is by that court entered up, ready for an execution or enforcement. But on this feature of the case, I am not certain; and it is to determine this feature finally that I would be glad if the court would sustain this motion and re-instate the petition for a rehearing. The district court meets here June the 3rd; and this court can take up this matter, and if it so desires, I will prepare a typewritten brief on this subject and file it before the court

122 by which I will try to come to a definite conclusion what has to be done in appealing from state courts of this state to the U. S. Supreme Court. So far I have not been able to find a decision of the Supreme Court of the U. S. directly on this condition of state procedure. It is vastly important to do —; because if the time commences to run from the time of the decision of this court, then the supersedeas bond, writ of error etc., must be given with- 60 days thereafter, or after the hearing on the petition for a rehearing; and if given after that time and the case is taken up, it is liable to be dismissed on motion because not perfected in time, where perfected after the mandate goes down to the lower court. And it does not begin to run until it is perfected in the trial court, then when sooner appealed, it would be subject to motion to dismiss because the appeal was taken prematurely. So in either event, an appeal from this court to the Supreme Court of the United States is thus made subject to uncertainty as to whether it will be sustained, and that simply on this feature. Of course, the appeal lies within two years; but if it is to be superseded it must be perfected within this 60 day pro-

vision of Rev. Stat. sec. 1008. Besides, another uncertainty creeps in here in this case at bar. This court affirmed the court below. It looks preposterous to say this court has no such power, and I do not so state; but so far I have not found any express power given this court to affirm a decision, nor have I found any provision what is to be done in case this court affirms a decision; but the statute, sec. 4770, does provide that the district court may affirm a judgment and render judgment against the plaintiff in error etc. If on appeal where this court find no error in the court below there is no power to affirm the lower decision but must simply dismiss the appeal, for want of reversible errors, a decision affirming the same would be at least an irregularity which might effect the appeal to the higher court and the procedure also. But, as I have said, I have not had time sufficient to ascertain just what is to be done about such things,
and would like to ascertain such matters before going on
123 with this appeal; and I presume the court would also like to
be certain about this feature, unless already informed. It seems to be a condition in such appellate[d] procedure a little out of the usual conditions found in such matters and as yet I have found no decision just fitting the exact condition in our state. All uncertainty in this case can be avoided if this motion is sustained and the rehearing reinstated and the case then passed on and mandate sent down while the district court is in session here. Then perfect the appeal within 60 days from the entry of the mandate. This court has jurisdiction of all cases appealed until the mandate is sent down. Thomas vs. Thomas, 113 Pac. 1058; and the mandate is still in this court. With this explanation, I submit the matter for the consideration of the court. This case is one of the greatest importance to the citizens of this part of the state. It involves the validity of a deed of a married woman made on the 15th of January, 1907, in which her *won* lands are sought to be conveyed and in which her acknowledgment and the deed also shows she joined therein alienating simply her dower whereas she owned the fee in the lands. This is the first time this important matter has come before this court; and it has decided that, before statehood and in Indian Territory, a married woman could convey her own lands as a fem*me* sole; and that such deed passed all her rights in the lands in controversy in the case. She controverts this feature as well as the validity of said deed on the ground that no consideration therefor ever passed and she retained possession of said lands even to this day; and that she is a Creek citizen and the lands were inherited from her own child and was under the five years restriction provision of the Creek treaties, and said deed having been made Jan. 15th, 1907, was void because made before the expiration of said five years, and passed no right, title or interest whatever to the grantee in said deed who never had possession of said lands at any time before or after the date of said deed but the same ever remained with the plaintiff in error and is so in her possession at the present time. May 28, 1912.

Respectfully submitted,

LEWIS C. LAWSON,
Counsel for Plaintiff in Error.

Filed June 3, 1912. W. H. L. Campbell, Clerk.

124 And thereafter, to-wit, at the July 1912 term of said Court, on the 18th day of July, 1912, the following proceedings were had in said cause, to-wit:

No. 1228.

MARTHA ADKINS, Plaintiff in Error,
vs.
HENRY C. ARNOLD, Defendant in Error.

It is ordered by the court that the motion to reinstate petition for rehearing in this cause, be, and the same is hereby denied.

125 In the Supreme Court of the State of Oklahoma.

Certificate.

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 124 pages, numbered from 1 to 124, both inclusive, are a full, true and complete transcript of the record and all proceedings in the Supreme Court in cause No. 1228, Martha Adkins, Plaintiff in error, versus Henry C. Arnold et al., Defendants in error, as the same remain on file and of record in my office.

In witness whereof, I hereto set my hand and affix the seal of said Court, at Oklahoma City, this 15" day of August, 1912.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk, Supreme Court of Okla.,
By JESSIE PARLOE, *Deputy*.

Endorsed on cover: File No. 23,341. Oklahoma, Supreme Court. Term No. 335. Martha Adkins, plaintiff in error, vs. Henry C. Arnold and Jake F. Arnold. Filed August 28th, 1912. Filed No. 23,341.

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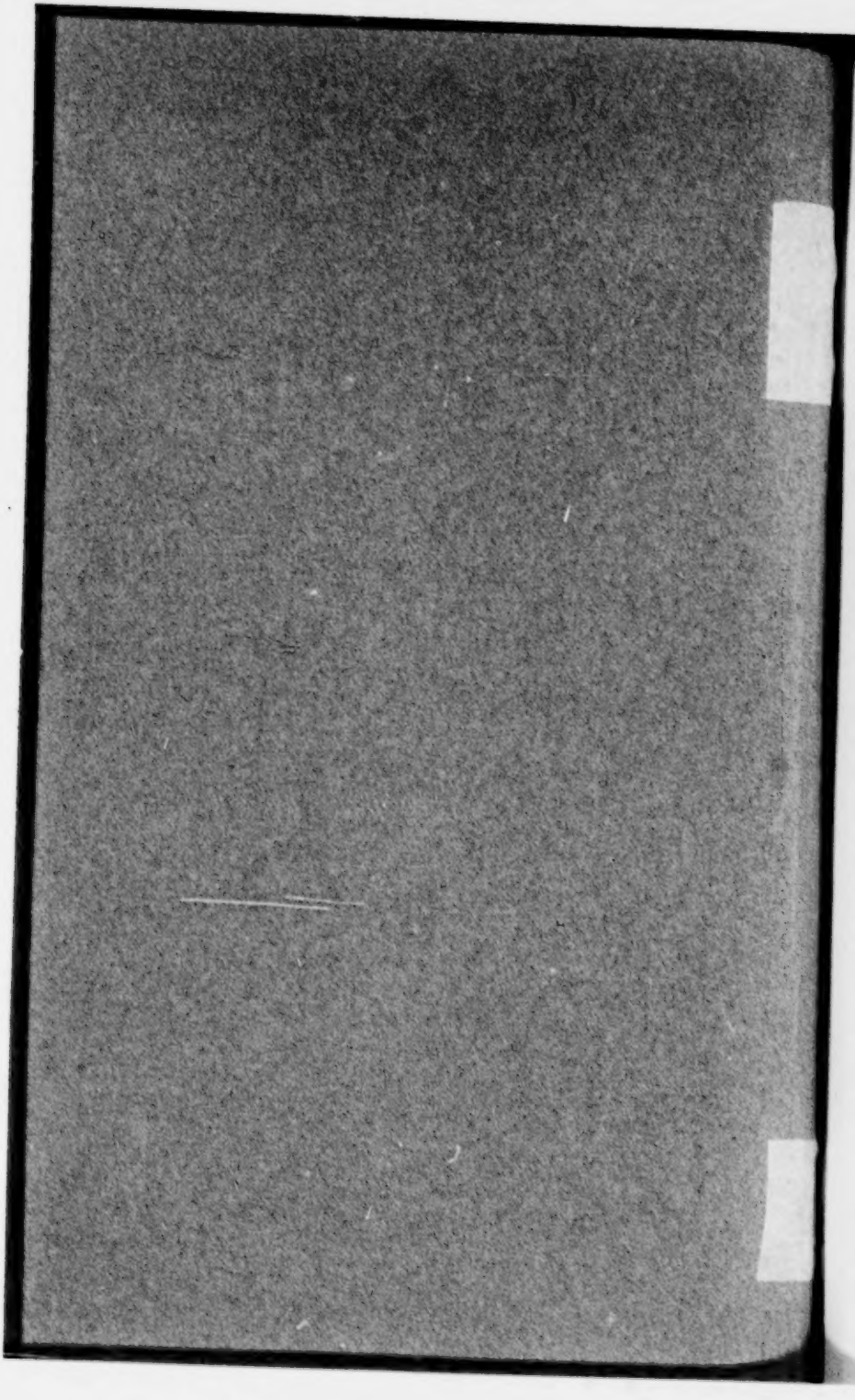

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ARGUMENT OF COUNSEL FOR PLAINTIFF IN ERROR.

First Assignment: Said court erred in holding and deciding that "There is no charge of fraud, deceit or inadequacy of price made in this case;" whereas the answer of the plaintiff in error herein charged that she had never received any consideration whatever for said lands, and joined in said deed only for the purpose of alienating her dower therein, and was still and ever had been since their segregation, in the peaceable and quiet possession of said lands, and to which said answer said defendant in error, Henry C. Arnold, interposed alone his respective demurrers, which thus admitted said facts in said answers, and said decision necessarily resulted in depriving the plaintiff in error of her rights and interest in said lands in violation of said section 1 of said 14th Amendment to the Constitution of the United States, and section 7 of article 2 of the Constitution of the State of Oklahoma, which provides "No person shall be deprived of life, liberty or property, without due process of law" 19-64

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First Proposition: That said deed to said Jake F. Arnold was null and void, because, under the allegations in her said answers and cross complaints, said deed was never made, executed or delivered to said Jake F. Arnold; that plaintiff in error never received any consideration therefor, or for said lands therein described; that she at that time was in possession of said lands and ever thereafter retained such possession and claimed said lands as her own in fee simple 70-77

Second Proposition: That said deed bears date the 15th of January, 1907, and said lands were derived to the plaintiff in error under an Act of Congress known as the Original Creek Agreement, which put in force in the Indian Territory the Creek laws of descent and distribution of said Creek Nation, and said lands, being thus inherited by plaintiff in error from her said deceased daughter, Otheola Adkins, were restricted in her hands

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under said Act of Congress, and especially section 7 thereof and under section 16 of the Supplemental Creek Agreement, which became effectual on the 7th day of August, 1902, and said deed was therefore null and void when so made, because of said respective Acts of Congress. 77-87

Third Proposition: That said deed was absolutely null and void for the further reason that the same was not made or executed in the way and manner provided for in chapter 27 of the Statutes of Arkansas of 1884, and especially as therein provided for in sections 648 and 659, which said chapter was put in force under an Act of Congress approved on the 19th day of February, 1903, the legal effect and consequence of which was discussed and considered in the opinion of said Supreme Court and by which the plaintiff in error was denied her right, title and interest in said lands..... 87-162

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In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

No. 335.

MARTHA ADKINS, - - - - *Plaintiff in Error,*

vs.

HENRY C. ARNOLD and JAKE F. ARNOLD, *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Statement of Case:

This is a suit brought in the District Court of Hughes County, State of Oklahoma, by the defendant in error, Henry C. Arnold, against defendant in error, Jake F. Arnold, and others, for the purpose of enforcing a mortgage upon the lands in controversy to secure a note of $2090.00, which said defendant in error, Henry C. Arnold, claims against said Jake F. Arnold, as evidenced by a promissory note, a copy of which purports to have been filed

with his petition therein as exhibit "A," but which in fact was not filed; that said mortgage purports to have been given to said Henry C. Arnold by said Jake F. Arnold on the 23rd day of February, 1907, and duly recorded. The action went by default as to said Jake F. Arnold, and W. B. Adkins disclaimed any right or interest in the matter, as shown by his answer on page 23 of the record. The plaintiff in error filed her answer therein, as shown on pages 21 and 22 of the record, and afterward, by leave of court, filed her amended answer thereto, as shown on pages 26 to 30, inclusive, to which defendant in error, Henry C. Arnold, filed his demurrer, as shown on page 31, and the said demurrer being sustained, the plaintiff in error filed her second amended answer and cross petition, as shown on pages 31 and 32 of the record.

In her said answers, the plaintiff in error presents that she is a Creek citizen by blood and a member of the Creek tribe of Indians and was so enrolled as a citizen of said Creek Nation and thereafter received her allotment as such citizen out of the domain of the Creek Nation; that said W. B. Adkins was her husband, but was not a Creek citizen, but was a non-citizen of said tribe or nation; that of the marriage between plaintiff in error and the said W. B. Adkins there was a daughter born, named Otheola Adkins; that said daughter was the only child born of said marriage; that said child

was also a member of said Creek Nation and was so enrolled under and by reason of the Original Creek Treaty or Agreement; that on the .... day of November, 1901, said daughter departed this life intestate, being a mere infant at the time of her death, and leaving no brothers or sisters or the descendants of any brothers or sisters to survive her at the time of her death, but left surviving her said father and mother; that at the time of her death, the Creek laws of descent and distribution were in force in said Creek Nation and were put in force therein under and by reason of said Original Creek Agreement, and for the purposes of this suit, such laws were in said answers presented as follows:

> "*Sec. 6.* Be it further enacted, that if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested persons, and in all cases where there are no children, the nearest relation shall inherit the property.
>
> *Sec. 8.* The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate, if there be no heirs, and a child's part if there should be other heirs, in all cases where there is no will. The husband surviving shall inherit of a deceased wife in like manner."

That under said Creek laws the plaintiff in error, as the mother of said child, was the nearest relation, and as such nearest relation was the sole and

only heir of said daughter, and as such heir, the plaintiff in error became entitled to all the estate, both real and personal, of which said daughter died seized, possessed, or entitled; that her father, W. B. Adkins, took no right, title or interest whatever in and to any of such property, real or personal, belonging to said daughter, or to which she was thus entitled at the time of her death; that at the time of her death said daughter, her father and mother, all lived or resided in the said Creek Nation, and in that portion thereof now comprising said Hughes County; that by reason of the citizenship and enrollment of said Otheola Adkins, an allotment of one hundred and sixty acres of land was duly allotted and set apart out of the domain of said Creek Nation by the Dawes Commission, as provided by law, and after the death of said daughter, patents were duly issued therefor to the heirs of said Otheola Adkins, and approved by the Secretary of the Interior, as required by law, and thereafter duly recorded, as provided by law; that the north half of the southeast quarter of section thirteen (13), township eight (8) north, range nine (9) east, mentioned and described in said petition of said Henry C. Arnold, is a part and portion of said one hundred and sixty acres of land thus allotted to the said Otheola Adkins and patented to her heirs, as aforesaid; that the plaintiff in error is the owner in fee simple of said lands thus described in said petition and therein sought to be subjected to the payment of said

note and mortgage; and the answer specifically alleges (page 28):

> "That this defendant has at no time or place, made, executed or delivered any deed or conveyance at any time to said Jake F. Arnold, or anyone else, for said lands thus mentioned in said petition, or any part thereof; and that this defendant (meaning plaintiff in error) is now and ever has been since said lands were thus segregated as aforesaid, in the full and complete possession of said lands and claimed the same as her own in fee simple.
>
> "*4th.* That prior to the 23rd day of February, 1907, said W. B. Adkins pretended to make and execute to said Jake F. Arnold a deed for said north half of the southeast quarter of section thirteen, township eight north, range nine east, in Hughes County, and this defendant signed said deed as the wife of said W. B. Adkins, for the purpose only of relinquishing her dower in said lands described in said deed, when, in fact, said W. B. Adkins had no right, title or interest in said lands, and this defendant then nor at any other time had any dower therein, but had, held and owned the fee simple title thereto; that at the time of making said deed by said W. B. Adkins, as aforesaid, this defendant and said W. B. Adkins were man and wife and had been for a long time prior thereto and ever since said date, and were then living and cohabiting together as man and wife in said Creek Nation and in that portion thereof now embraced in said County of Hughes where said lands are situated; that said pretended deed of said W. B. Adkins was so executed in said Creek Nation, and is now of record in the

proper office for recordation of deeds, of Wewoka, Oklahoma, and was so recorded long prior to the 16th day of November, 1907, under the laws in force at that time, a copy of which deed is, or will be by permission of the court, filed herewith as part hereof, marked exhibit 'A'; that said deed conveys to said Jake F. Arnold no right, title or interest in said land, but that said deed, as well as said mortgage mentioned and described in plaintiff's petition, are clouds upon the title to said lands therein described as belonging to this defendant, and this defendant asks that the same may be cancelled and set aside as to this defendant and remove the same as clouds upon said title; that as to said other lands, to-wit, lot No. 2, in block 19, and lot 4 in block No. 20, in the Town of Yeager, Oklahoma, this defendant has nothing whatever to do and never at any time had any right, title or interest and claims none at this time; nor does she have any interest in said note, and knows nothing about the same.

"*5th.* That said pretended deed of said W. B. Adkins to said Jake F. Arnold, together with the certificate of acknowledgment thereto, are as follows:

WARRANTY DEED WITH RELINQUISHMENT OF DOWER.

'*Know All Men by These Presents:* That W. B. Adkins, of Yeager, Indian Territory, and Martha J. Adkins, his wife, party of the first part, in consideration of the sum of Fifteen Hundred Dollars to me paid by Jake F. Arnold, cashier, of Yeager, Indian Territory, party of the sec-

ond part, the receipt whereof is hereby acknowledged, do hereby bargain, grant, sell, and convey unto said Jake F. Arnold, cashier Farmers Bank of Yeager, I. T., his heirs and assigns, a certain lot, parcel or tract of ground situated in the Creek Nation, Indian Territory, described as follows, to-wit: North half of the southeast quarter of section thirteen, township eight north, range nine east, of the Indian Base and Meridian in the Indian Territory, with all privileges and appurtenances thereto belonging. To have and to hold the aforegranted premises unto the said party of the second part, his heirs and assigns in fee simple forever; and I, the said W. B. Adkins, for myself and my heirs, executors and administrators, do covenant with the said party of the second part, his heirs and assigns, that the said property is free from all incumbrances; that I have a good right to sell and convey the said property, and that I will and my heirs, executors and administrators, shall warrant and defend the same unto the said party of the second part, his heirs and assigns, forever, against all lawful claims and demands of all persons.

And for the consideration aforesaid, and for divers other good and valuable considerations, I, Martha J. Adkins, wife of the said W. B. Adkins, do hereby release and quit-claim unto said party of the second part, his heirs and assigns forever, all of my right, claim or possibility of dower in or out of aforesaid property.

Witness our hand and seals on this the 15th day of January, 1907.

W. B. ADKINS, (Seal)

MARTHA J. ADKINS. (Seal)

United States of America, Indian Territory, Western District—ss.

On this the 15th day of January, 1907, personally appeared before me a Notary Public within and for the above named district, W. B. Adkins, to me personally well known as the person subscribing the foregoing instrument and acknowledged that he had subscribed and executed the same for the consideration and purposes therein set forth as his free, voluntary act and deed. And I further certify that on this day also voluntarily appeared before me, the undersigned notary public, Martha J. Adkins, the wife of said W. B. Adkins, well known to me as the person whose name appears upon the within and foregoing deed, and in the absence of her said husband declared that she had of her own free will signed the relinquishment of dower therein expressed, for the purposes and consideration therein contained and set forth, without compulsion or undue influence of her husband.

Witness my hand and seal as such notary public on the day and year first above mentioned.

Chas. Burton,

Notary Public.

My commission expires Aug. 22nd, 1910.'

"That said deed was prepared from a blank form and is in the usual form of a deed used to relinquish the dower rights of married women in the lands of their husbands under the law as it was in force at the time said deed was pretended to have been executed, and the same purports to relinquish defendant's dower in said lands and nothing more, and nothing more than a dower therein can be conveyed by said pretended deed; that the date of recordation of said deed of said W. B. Adkins to said Arnold, as shown by the endorsement on the back of said deed, is the 17th day of January, 1907, and defendant alleges that said date is the correct date of recordation thereof.

"Wherefore, this defendant prays that said pretended deed from said W. B. Adkins to said Arnold and said mortgage given by said Arnold upon said lands aforesaid be cancelled and set aside as to this defendant and removed as a cloud upon the title to said lands; that she be decreed to be the owner in fee simple to said lands herein claimed; that she be decreed her proper costs herein expended; and that all such other further and general relief herein may be granted to this defendant as the nature of this case may require, or which to equity and good conscience may seem just and proper, and defendant will ever pray, etc.

MARTHA ADKINS, *Defendant.*
By Counsel.

L. C. LAWSON,
CRUMP & ROGERS,
Counsel for Said Defendant.

By agreement of counsel for plaintiff and defendant, Martha Adkins, the verification of

the above foregoing answer of said Martha Adkins is waived.

L. C. Lawson,
Crump [&] Rogers,
Counsel for Plaintiff.

O. A. Morton,
Counsel for Said Defendant."

This answer and amended answer also contained a general denial of each and every material allegation made and presented in the plaintiff's petition and called for strict and positive proof thereof. To this answer and amended answer the defendant in error, Henry C. Arnold, filed his demurrer, except as to said general denial, for the reason that the same does not state facts sufficient to constitute a defense in the plaintiff's petition or any part thereof, and for the further reason that the same does not state facts sufficient to entitle her to affirmative relief, as prayed for therein (p. 31). The trial court sustained this demurrer on the notion that there was no allegation of want or failure of consideration for the deed; whereupon the plaintiff in error filed her second amended answer, which is in the words and figures following:

"*H. C. Arnold, Plaintiff*, v. *Jake Arnold et al., D'f'ts.*—No. 128.

Amended Answer to the Amended Answer and Cross Petition of Martha Adkins.

Comes now the defendant, Martha Adkins, by counsel, on this the 21st day of July, 1909,

and in compliance with an order herein made at this term of this court, and as an amended answer to her former amended answer and cross petition herein filed at a former term of this court, charges and avers that, at no time or place, or in any way or manner whatever, has she, the said defendant, received any consideration whatever for the lands mentioned and described in her said former amended answer and cross petition hereinbefore filed in this cause or for the execution of the said deed for said lands therein mentioned; nor has she, said defendant, at any time or place or in any way, form or manner whatever, received, directly or indirectly, any part or portion of the said consideration of fifteen hundred dollars mentioned in said deed as the consideration for said lands therein described; nor has she the said defendant at any time received any consideration of any kind, character, or description whatever, for the execution of said deed or for the said lands therein and in said amended answer and cross petition mentioned and described, or by virtue of said deed having been so executed and said lands having been thus attempted—be conveyed by said deed or through its force and effect.

MARTHA ADKINS,
By Counsel.

CRUMP & ROGERS,
LEWIS C. LAWSON,
Counsel for Defendant, Martha Adkins.

Verification of this answer is waived by agreement of counsel for plaintiff and defendant, Martha Adkins, as evidenced by court record."

To these amended answers the defendant in error again filed his demurrer on the ground that the same did not set up any defense to this action, or cause of action by way of cross bill against the plaintiff, as shown on page 32; and on the 27th day of July, 1909, made a motion asking the court to render judgment for said Arnold against the plaintiff in error upon the pleadings of said plaintiff and defendant Martha Adkins filed therein, as shown on page 33 of the record. The trial court again sustained said demurrer and motion, on the 25th of September, 1909, and entered judgment therein against the plaintiff in error and in favor of said defendant in error, Henry C. Arnold, holding and adjudging that said Arnold "have judgment on the pleadings as against said Martha Adkins; and that said Martha Adkins had no interest in and to said lands described in her answer and cross petition, to-wit: The north half of the southeast quarter of section 13, township eight north, range 9 east, Hughes County, Oklahoma;" and decreed further that said lands be sold by the sheriff of said county and apply the proceeds arising from said sale to the satisfaction of said judgment, to all of which said Martha Adkins excepted, as shown on pages 41 and 42 of the record; whereupon said plaintiff in error, on the 25th of September, 1909, moved said trial court for a new trial therein, upon nine different grounds, as shown on page 34 of the record, whereupon said trial court overruled said motion, to which the plain-

tiff in error again excepted, and took said case by petition in error to the Supreme Court of said state (page 42); and thereafter said matters came on to be heard in said Supreme Court and the same was affirmed, as shown on pages 53 to 62, inclusive, of the record.

The real gist presented by the several answers of the plaintiff in error and the several judgments and decrees of said courts, is:

First

That the plaintiff in error is a Creek Indian by blood and a member of the Creek tribe of Indians located in the Creek Nation;

Second

That of the marriage between the plaintiff in error and said W. B. Adkins there was one child born named Otheola, who died in November, 1901, seized of her allotment out of the domain of the said Creek Nation, but which said allotment was patented to her heirs after her death;

Third

That said lands were allotted as aforesaid under the Original Creek Agreement and their disposition is governed by said Original Creek Agreement;

Fourth

That said Original Creek Agreement went into force and effect on the 25th of May, 1901, which was

several months prior to the death of said Otheola, and by which agreement the Creek laws of descent and distribution were put in force in said Creek Nation, and, therefore, on the death of said Otheola, governed the devolution of the title to said lands;

Fifth

That the plaintiff in error, as the mother of said Otheola, became the sole and only heir at law of her said deceased daughter;

Sixth

That said proceedings involved one-half of said allotment, and the same was so decreed to be sold for a purported debt of one Jake F. Arnold to the defendant in error, Henry C. Arnold;

Seventh

That the plaintiff in error never made, executed, or delivered, to said Jake F. Arnold, any deed or conveyance for said lands thus attempted to be sold;

Eighth

That the plaintiff in error claims said lands as her own in fee simple; and at the time of said proceedings, and ever prior thereto from the time said lands were thus segregated, the plaintiff in error was in the exclusive possession of said lands and so claiming the same in fee simple;

Ninth

That the plaintiff in error had never received any consideration whatever for said lands or for

making said deed, neither directly nor indirectly, but still held the possession thereof after her said husband had pretended to make said deed for the lands on the 23rd day of February, 1907, up to and including the time of said proceedings;

Tenth

That at the time said deed purports to have been made on the 15th day of January, 1907, and long prior thereto and ever thereafter, the plaintiff in error and said W. B. Adkins were husband and wife and were then living, residing and cohabiting together as husband and wife, in said Creek Nation, and in that part or portion of said Creek Nation now embraced in said Hughes County; and, therefore, said deed was absolutely null and void, as to said plaintiff in error, *first*, because she had never sold said lands, or made, executed or delivered a deed therefor to said Jake F. Arnold, and had never received any consideration whatever for said lands, and was still in the open and exclusive possession thereof and ever had been since the same was segregated, and said judgment thus attempting to deprive her of said property, without any consideration whatever, was not due process of law, as guaranteed to her by the Constitution of the State of Oklahoma, and by the 14th Amendment to the Constitution of the United States; *second*, because the plaintiff in error had thus inherited said lands from her said deceased daughter, Otheola,

under the terms, provisions and conditions of said Original Creek Agreement, set forth in her said answer; and under and by reason of said Original Creek Agreement and especially section 7 thereof, and section 16 of the Creek Supplemental Agreement, approved on the 30th day of June, 1902, said lands were restricted and their alienation was thereby forbidden and prohibited as of the 15th day of January, 1907, and said deed thereby and by reason of said Original and Supplemental Creek Agreements became absolutely null and void and ineffectual for any purpose whatever, and said judgment and decree of said state courts are not only in violation of the 14th Amendment to the Constitution of the United States, but likewise in open violation of, and repugnant to, said Original and Supplemental Creek Agreements under which said plaintiff in error claims and derived her title, interest and estate to said lands; *third*, because said purported deed was not the deed of said plaintiff in error, but the pretended deed of said W. B. Adkins, and does not purport to be the deed of the plaintiff in error, according to its own terms and provisions, but the same on its face and likewise in the acknowledgment thereto purports to be simply an alienation of her dower in and to said lands, whereas, she had no dower therein but at that time owned the fee simple title thereto, and said judgment and decree was simply an attempt to enlarge

the legal force and effect of said deed as to the rights and interests of the plaintiff in error in said lands, contrary to the general law governing the alienation of real estate and especially the separate real estate of married women; *fourth*, and because said deed was not signed or acknowledged by the plaintiff in error, in the way and manner required by Chapter 27 of Mansfield's Digest of the Statutes of Arkansas of 1884, and especially sections 648 and 659 thereof, which said chapter was put in force in the Indian Territory by an Act of Congress of February 19, 1903 (32 U. S. Stat. L. 841), and which said Act of Congress alone provided for, and governed the alienation and conveyance of a separate real estate of married women then and thereafter living and residing in the said Indian Territory or then owning separate real estate therein in fee simple, and by which said section 659, in order to perfect the alienation of her separate real estate, a married woman had to be examined privily and apart from her husband, as therein made and provided, before the title thereto would pass to her vendee. The plaintiff in error did not so execute said deed, and was not so examined privily and apart from her husband; and, therefore, her title to said lands did not pass under said deed to said Jake F. Arnold, but still remained firmly vested in her during this whole proceeding, and the act of said courts in attempting to thus decree said lands

away from her is not in accordance with due process of law; nor was it in accordance with regular judicial procedure of said state, or in accordance with the general law or said Acts of Congress, applicable to said matters.

ARGUMENT OF COUNSEL FOR PLAINTIFF IN ERROR.

The first assignment of error is as follows:

First: **Said court erred in holding and deciding that "There is no charge of fraud, deceit or inadequacy of price made in this case;" whereas the answer of the plaintiff in error herein charged that she had never received any consideration whatever for said lands, and joined in said deed only for the purpose of alienating her dower therein, and was still and ever had been since their segregation, in the peaceable and quiet possession of said lands, and to which said answer said defendant in error, Henry C. Arnold, interposed alone his respective demurrers, which thus admitted said facts in said answers, and said decision necessarily resulted in depriving the plaintiff in error of her rights and interest in said lands in violation of said section 1 of said 14th Amendment to the Constitution of the United States, and Section 7 of Article 2 of the Constitution of the State of Oklahoma, which provides: "No person shall be deprived of life, liberty or property, without due process of law."**

It will be observed at a glance at the record in this case that there was no ground for the Supreme Court of Oklahoma to hold that "There is no charge of fraud, deceit or inadequacy of price made in this case," for, on pages 31 and 32 of the record, as

hereinbefore set forth, is the second amended answer of the plaintiff in error, in which she charges that she never received any consideration whatever for said deed or lands in controversy. The court will bear in mind that these decisions were based on the several demurrers of the said Henry C. Arnold to the several answers and cross petitions of the plaintiff in error and this motion of said Arnold for a judgment on the pleadings. The answers and cross petitions contained a general denial of everything presented in the petition of said defendant in error; and it is therefore apparent at a glance that a judgment on the pleadings in favor of said defendant in error and against the plaintiff in error was wholly unfounded, as the general denial under the pleadings of said state put the plaintiff below on proof of all his material allegations in his petition, which were thus denied by the general denial.

In the case of *Dunn et al.* v. *Claunch et al.*, 15 Okla. 27, 78 Pac. 388, which was an action on a forthcoming bond given on an attachment, the Supreme Court observed:

> "The defendant filed an unverified general denial. Judgment was rendered by the court in favor of plaintiffs on the pleadings, from which action of the court the makers of the bond appeal; but the appellees contend that this court cannot review the action of the lower court, because no motion for a new trial was made. No evidence was introduced on the trial and, in our opinion, it was not necessary to file

a motion for a new trial. The error, if any, appears from the judgment roll. The trial court evidently had in mind the rule that the execution of a written instrument must be denied under oath, but it also overlooked the fact that, admitting the execution of the bond, the general denial states a good defense, in that it denies that the property was ever delivered to Dunn when the bond was given. It denies that Dunn removed the property out of the territory, or that he failed to surrender it to answer to the judgment. The defendants were entitled to a trial on the pleadings filed, and the burden was on the plaintiffs to establish the necessary allegations of the petition by evidence, except the execution of the bond.

The judgment of the lower court is hereby reversed, and a new trial granted at the cost of the appellees, and the lower court is directed to proceed in conformity with the views herein expressed."

In section 134, page 1000, Vol. 2 of Wilson's Statutes of Oklahoma, which relates to pleadings, it is provided:

"Every material allegation of the petition, not controverted by the answer, and every material allegation of new matter in the answer not controverted by the reply shall, for the purposes of the action, be taken as true."

The court will observe that the answers and cross petitions of the plaintiff in error contained a separate general denial of the material allegations of the plaintiff's petition; but there was no reply

whatever to any of the answers and cross petitions of the plaintiff in error. Consequently it was incumbent upon the plaintiff below to prove his material allegations set forth in his petition; but, as said plaintiff failed to file any reply to said answers and cross petitions of the plaintiff in error, her material allegations therein stated were, under this statute, "taken as true," and needed no proof whatever.

In section 114 of said statutes, it is further provided:

> "In all actions, allegations of the execution of written instruments and indorsements thereon, of the existence of a corporation or partnership, or of any appointment or authority, or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney."

The first answer of the plaintiff in error containing this general denial, was verified by the plaintiff in error, as shown on page 22 of the record; and, as shown on pages 30 and 32 thereof, her verification of her amended answers and cross petitions was waived by said defendant in error, which leaves said pleadings the same as if all said answers had been regularly verified, as required in said section 114, and which said answers thus again imposed upon the plaintiff below, Henry C. Arnold, the burden of proving not only the execution of the

note and mortgage thus sued upon, but likewise the indebtedness thereby claimed to have existed between said Henry C. Arnold and Jake F. Arnold, and also the legal right, power and authority of said Henry C. Arnold and said state court to subject said lands to the payment of said note and mortgage; without such proof of said material allegations in said plaintiff's petition, said plaintiff below could in no wise prevail in said suit; nor could said state courts give him any relief therein, as there was no proof before said courts to sustain such allegation, and the decrees therein so rendered in the absence of such proof are simply arbitrary and without foundation, and, being so, said judgment and decrees resulted simply in depriving the plaintiff in error of her said lands, and appropriating the same to the payment and satisfaction of a purported, although unproven to her, claim of Henry C. Arnold against said Jake F. Arnold aggregating the sum of twenty-three hundred ninety dollars and sixty-three cents, contrary to the express provision of section 7 of article 2 of the Constitution of the State of Oklahoma, and of the 14th Amendment to the Constitution of the United States.

In section 124 of said statute, it is further provided:

> "If the action, counterclaim or setoff be founded on account or on a note, bill, or other written instruments as evidence of indebtedl-

> ness, a copy thereof must be attached to and filed with the pleadings. If not so attached when filed, the reason thereof must be stated in the pleading."

The petition in this case filed in the court below by said Henry C. Arnold, purports to have a copy of said note attached thereto as exhibit "A"; but no such an exhibit or copy of said mortgage thus sued on is to be found in the record; nor does the record disclose any evidence whatever, adduced on the hearing of this case, of the existence of said note or mortgage or the indebtedness thus claimed to have existed between said Henry C. Arnold and Jake F. Arnold. No evidence whatever of such matters or any other allegation in said petition, was ever adduced on the trial of said case in said state courts, and the record in this case is conclusive evidence of that fact. Yet notwithstanding all of these matters, the plaintiff below, Henry C. Arnold, after first filing his demurrers to said answers and cross petitions of the plaintiff in error, then made his motion for a judgment on the pleadings, as shown on page 33 of the record, and the same was sustained by the court, as shown on the face of its decree found on page 41 of the record.

In *Moore* v. *Murry et al.*, (Feb. 24, 1904) 75 Pac. 515, the Supreme Court of Montana held:

> "Judgment on the pleadings cannot be entered where there is an issue framed thereby."

Citing a long line of decisions of said court, and held further:

> "Denials which are as specific as the allegations they are intended to meet, and which controvert the spirit and substance of the adverse pleading, are sufficient to raise the issues."

In *Nolen* v. *Owens*, 74 Pac. 954, the Supreme Court of Oklahoma Territory held:

> "A motion for judgment on the pleadings should be denied where the pleadings raise a question of fact to be tried."

In *Moffett* v. *Oregon & C. R. Co.*, 80 Pac. 489, the Supreme Court of Oregon held:

> "An answer negativing an essential averment of the complaint raises an issue for trial, and makes the rendition of judgment on the pleadings improper."

If the answer contains a denial of the material facts alleged as a cause of action in the complaint, and a special defense stated separately, the plaintiff is not entitled to judgment on the pleadings, even if the entire cause of action is confessed in the special defense.

Nudd v. *Thompson*, 34 Cal. 39;

Amador County v. *Butterfield*, 51 Cal. 526.

To the same effect is *Craig* v. *Bateman*, 49 Cal. 71.

Where any of the material allegations of the petition are denied by the answer, it is error to ren-

der judgment on the pleadings. *Johnson* v. *Manning*, 3 Idaho 352; *Boto* v. *Vandament*, 67 Cal. 332; *Didmer* v. *Martin*, 87 Cal. 88; and *Hastings* v. *Bank of Longmont*, 4 Colo. App. 419.

In *Walling* v. *Brown et al.*, 72 Pac. 960, the Supreme Court of Idaho held:

> "When a party moves for judgment on the pleadings, he not only, for the purposes of his motion, admits the truth of all the allegations of his adversary, but must also be deemed to have admitted the *untruth* of all his own allegations which have been denied by his adversary."

See also to the same effect: *Roberts* v. *Colorado Springs & I. Ry. Co.*, 101 Pac. 59 (Col.); *Phenix* v. *Bijelich*, 30 Nev. 257, 95 Pac. 351; and *Idaho P. M. Co.* 14 Idaho 294.

A motion upon the pleading for judgment cannot be made to take the place of a demurrer or other plea. *Roberts* v. *Colorado Springs etc. R. Co.*, 101 Pac. 59; *Shuler* v. *Allam*, 45 Colo. 372, 101 Pac. 350 and 352, where a number of decisions to that effect are cited.

Mr. Jurv, in his recent treatise on Adjudicated Forms of Pleading and Practice, page 1885, says:

> "As a general proposition, a motion for judgment on the pleadings, based on facts thereby established, cannot be sustained except where, upon such facts, a judgment different from that pronounced could not be rendered,

notwithstanding any evidence which might be produced; or, in other words, such a motion cannot be sustained unless, under the admitted facts, the moving party is entitled to judgment, without regard to what the findings might be on the facts upon which issue is joined. Therefore, in determining the rights of the defendant to the judgment given him, the real question to determine is the sufficiency of the admitted facts to warrant the judgment rendered and the materiality of those on which issue was joined. A motion on the pleadings cannot prevail unless, on facts thereby established, the court, as a matter of law, can pronounce judgment on the merits; that is, determine the rights of the parties to the subject matter of the controversy, and render judgment in relation thereto which is final between the parties. Such a motion cannot, under the guise of a motion for judgment on the pleadings, be substituted for some other idea. *Mills* v. *Hart*, 24 Colo. 505, 52 Pac. 680, 65 Am. St. Rep. 241, citing *Rice* v. *Bush*, 16 Colo. 484, 27 Pac. 720; *Harris* v. *Harris*, 9 Colo. App. 211, 47 Pac. 841, approved in *Hoover* v. *Horn*, 45 Colo. 288, 101 Pac. 55, 56, and in *Roberts* v. *Colorado Springs Ry Co.*, 45 Colo. 188, 101 Pac. 59, 61."

But this summary of this subject is no more cogently expressed than by the Supreme Court of Oklahoma in the case of *Cobb* v. *Wm. Kenefick Co.*, 23 Ok. 440, where this court held:

> "A motion for judgment on the pleadings is a common and permissible practice, but, in a case where filed by the plaintiff to a defendant's answer, it should be granted only when such

answer, allowing every reasonable intendment in its favor, does not deny or state a defense to the material allegations of the petition."

And in considering these matters, the Supreme Court, in that case, on pages 450 and 451, made the following observations and cited the following decisions and authority:

"As a preliminary question, counsel for appellant in their brief contend that such a motion as was filed by appellee, for judgment on the pleadings, is unknown to our code. While this is, strictly speaking, true, yet the practice is well established by the procedure adopted in the courts and meets nearly, if not quite, uniform approval. Black on Judgments, Vol. 1, Sec. 15; Pleadings & Practice, Vol. 11, pp. 1044, 1045; *Hutchison* v. *Myers*, 52 Kan. 290, 34 Pac. 742.

In the case of *Hutchison* v. *Myers*, *supra*, Justice JOHNSTON, in the consideration thereof, speaking of the motion for judgment on the pleadings, has this to say:

'Complaint is next made of the action of the court in entertaining a motion for judgment upon the pleadings, and in allowing judgment against Hutchison without testimony. The motion for judgment on the pleadings was equivalent to a demurrer to Hutchison's answer, and is a common and permissible practice. If the averments of the petition were sufficient, and the answer did not allege defense, and no amendment was asked for or allowed, plaintiff was certainly entitled to a judgment.'

The general rule is stated in 23 Cyc. 769, as follows:

> 'This is a form of judgment not infrequently used in practice under the reformed Codes of Procedure. It is rendered on motion of plaintiff, when the answer admits or leaves undenied all the material facts stated in the complaint; but such a judgment cannot be given where the pleadings of defendant set up a substantial and issuable defense or where the suit is for unliquidated damages and the answer states matters in mitigation.'

And, say the authorities, in the consideration thereof, 'the pleadings objected to as insufficient will be liberally construed, and, the motion will be denied, where there is any reasonable doubt as to their insufficiency.' 11 Ency. of Pleadings & Practice, 1047; *McAllister* v. *Welker*, 39 Minn. 535, 41 N. W. 107; *Kelley* v. *Rogers*, 21 Minn. 146; *Giles Lithographic & Liberty Printing Company* v. *Recamier Manufacturing Company*, 14 Daly (N. Y.) 475. In the case of *Malone et al.* v. *Minnesota Stone Company*, 36 Minn. 325, 31 N. W. 170, the court, in the syllabus, says: 'Upon such motion every reasonable intendment is in favor of the sufficiency of the pleading objected to'."

Thus, by these authorities, it would seem that a motion for a judgment on the pleadings is the same as a demurrer to the pleadings itself; and in the case at bar we observe that the defendant in error resorted to both a motion for judgment on pleadings and demurrers to the several answers and

cross petitions of the plaintiff in error, each of which contained a general denial of all material matters set up in the petition of said defendant in error.

In the case of *City of Guthrie* v. *Lumber Co.*, 5 Okla. 774, 50 Pac. 84, the plaintiff brought an action to recover the value of property appropriated by said city, the defendant demurred and then answered, filing a general denial to the petition and setting up other matters in the nature of new matter, to which answer the plaintiff filed a demurrer and the court below sustained the plaintiff's demurrer and immediately gave judgment to plaintiff, just as did the court below in the case at bar, and the defendant appealed. The Supreme Court held:

> "It is error to sustain a general demurrer to an answer which includes a general denial of the averments of the petition. The demurrer should be overruled as to that averment."

In the case of *Lee* v. *Mehew et al.*, 8 Okla. 136, 56 Pac. 1046, Point 1, the same court held:

> "Where an answer explicitly denies a material fact stated in plaintiff's petition, which fact is essential to the plaintiff's right of recovery, it is manifest error to sustain a demurrer to such answer on the ground that it does not state a defense to the plaintiff's cause of action."

The plaintiff's cause of action in the case at bar was the foreclosure of a mortgage claimed

to have been executed upon the lands in controversy for the satisfaction of a note thereby claimed to have been secured and then held by the defendant in error, Henry C. Arnold. As before stated, the general denial of the plaintiff in error puts said defendant in error on proof not only of the execution of said mortgage and note but likewise of the liability of said lands to the payment and satisfaction of said note and the right of said defendant in error to subject said lands in said suit to the satisfaction of the same. Yet, without any proof whatever, and with these general denials in said answers and other affirmative matters therein alleged, showing that the plaintiff in error was then in the possession of said lands and had been since their segregation: that she had never made, executed or delivered a deed to said Jake F. Arnold for said lands; and had never received any consideration whatever for said lands; but was then claiming the same in fee simple and that said deed was not executed in the way and manner provided for in said chapter 27 of the Statutes of Arkansas: still the trial court sustained said motion for a judgment on the pleadings and likewise said several demurrers to said several answers of the plaintiff in error, and rendered judgment against the plaintiff in error and in favor of said defendant in error, Henry C. Arnold, for the sale and disposition of said lands to thus satisfy his unproven claim and demand against the defendant in error, Jake F. Arnold, contrary to all prior deci

sions of said court; and, contrary to such decisions, the Supreme Court of the State of Oklahoma affirmed said judgment. And, in the recent case of *H. Tillman Gillum et al.* v. *W. Thomas Anglin*, No. 2882, decided in May, 1914, and not yet officially reported, this same division of commissioners who affirmed the case at bar, held since the affirmance of this case that:

> "Where an answer contains statements of facts, which of themselves constitute a defense to plaintiff's action, it is error to sustain general demurrer to such answer."

And in the recent case of *Smith-Wagon Hardware & Implement Co.* v. *Jos. W. Moon Buggy Co.*, 26 Okla. 136, 108 Pac. 1103, the Supreme Court, proper, of said state, in Point 2 of the syllabus thereof, held:

> "On demurrer to an answer as defective, in that it does not state facts sufficient to constitute a defense, the pleading must be liberally construed, and all of its allegations for the purposes of the demurrer taken as true. And such demurrer can be sustained only where the answer presents defects so substantial and fatal as to authorize the court to say that, taking all the facts to be admitted, they constitute no defense to the cause of action stated in the petition."

Of course, these decisions are in accordance with the general law on the subjects discussed, and other decisions of said Supreme Court of Oklahoma

and other courts might easily be cited to the same effect; but we deem these sufficient to show that the regular and general procedure and practice in the State of Oklahoma, at the time of the decision of the case at bar, was not in accordance with the case at bar, but the very reverse of it; and, therefore, the case at bar is not, in that respect, sustained by prior and subsequent decisions of said Supreme Court.

In the case at bar, 32 Okla. 170, the Supreme Court of said state, respecting these matters, observed:

> "Before commencing the consideration of this decisive feature of the case, however, we will notice certain questions insisted on by defendant. It is alleged, as error of the court, the refusing to suspend all proceedings, upon sustaining the demurrer, until defendant could prosecute an appeal. While it is true that under the statutes there are cases in which an appeal will lie without a final judgment in the case (*Wesley et al* v. *Diamond et al.*, 26 Okla. 170, 109 Pac. 524), yet in this case, when the demurrer was sustained and defendant elected to stand on her pleading, and refused to plead further, she was before the court in default, and the plaintiff was entitled, on motion, to judgment. In *Pugh* v. *Stigler*, 21 Okla. 854, 97 Pac. 566, it is said:
>
> > 'Where the allegations of the complaint as amended are admitted in the answer, and affirmative matter pleaded, and the same filed as an answer and cross complaint, on a motion for judgment on the pleadings, the same should be rendered for

> plaintiff if the allegations of the cross complaint are insufficient to sustain a judgment for defendant'."

After the trial court has sustained the demurrer of the plaintiff below to the several answers of plaintiff in error, the plaintiff in error asked that further action in said matter be suspended for a period of thirty days from the adjournment of said court for the purpose of taking an appeal or petition in error to the Supreme Court of said state from said ruling of the trial court, as may be seen on page 33 of the record; but said motion was overruled by the trial court on the 27th day of July, 1909, but no record thereof was made until the 25th of September, 1909, as shown on page 41 of the record.

Section 535 of Chapter 66 of Wilson's Statutes of Oklahoma provides emphatically that:

> "The Supreme Court may reverse, vacate or modify any of the following orders of the District Court or a judge thereof: *first*, a final order; *second*, an order * * * that sustains or overrules a demurrer."

It was therefore an absolute right, so established by the statute itself, of the plaintiff in error to take an appeal to the Supreme Court of said state from said order of the trial court on its ruling in sustaining these demurrers; and such right was fully established by the Supreme Court of Kansas (from which state the chapter on pleadings and

practice of Oklahoma was taken) and Oklahoma, as shown in the following cases:

Union Pacific Ry. Co. v. *Estes*, 37 Kans. 229, 15 Pac. 157;

Bartholomew v. *Guthrie*, (1905) 71 Kans. 705, 81 Pac. 491;

Missouri Pacific Ry. Co. v. *Webster*, 3 Kans. App. 106, 42 Pac. 845;

Williamson v. *Kansas & T. Co.*, 6 Kans. App. 443, 50 Pac. 106;

Berry v. *Barton*, 12 Okla. 221, 71 Pac. 1074; and,

Hale v. *Bloe*, 18 Okla. 147, 90 Pac. 5; and,

Gillum v. *Anglin* (heretofore cited but not yet officially reported).

So it was an absolute right plaintiff in error had to appeal from said ruling of the court and to request said court to suspend further action in said case until such appeal could be perfected. But the trial court ignored her rights and over her protest proceeded with the final disposition of said case. This, as may be seen from said section and cases cited, was another departure from the practice in said state. But by some of said decisions it will be observed that the demurree may plead over and then appeal. But in the case at bar the plaintiff in error filed no other pleadings after her last amendment to which said demurrer was sustained, and judgment was therein given against her on the merits of the case, and from this the plaintiff in er-

ror took an appeal. She was therefore not in default at all, as indicated in the Supreme Court's opinion above cited. The case of *Wesley et al* v. *Diamond et al.*, 25 Okla. 170, 109 Pac. 524, is cited in this opinion of said Supreme Court; but that was an appeal from an order of the same prior court striking out certain parts of the plaintiff's petition, from which the plaintiff appealed to said Supreme Court and that court reversed the action of the trial court and remanded the case to said trial court with instructions to reinstate said petition. It therefore has nothing to do with the law governing a demurrer to pleadings.

The only other authority cited by said Supreme Court in sustaining and affirming said action of the trial court in the case at bar is *Pugh* v. *Stigler*, 21 Okla. 854. The first point in the syllabus of that case is as follows:

> "When the allegations of the complaint as amended are admitted in the answer, and affirmative matter pleaded, and the same filed as an answer and cross complaint, on a motion for a judgment on the pleadings, the same should be rendered for plaintiff, if the allegations of the cross complaint are insufficient to sustain a judgment for the defendant."

Here are two significant exceptions made in that case, namely: *First*, "where the allegations of the complaint as amended are admitted in the answer"; and, *second*, "if the allegations of the cross

complaint are insufficient to sustain a judgment for the defendant."

The reverse of this would be if the answer did not admit the allegations of the complaint; or, if the allegations of the cross complaint were sufficient to sustain a judgment for the defendant, then a motion for judgment on the pleadings would be clearly erroneous. This is exactly as so held by the Supreme Court of Oklahoma and other Supreme Courts in the various decisions rendered on that point and heretofore cited in this brief. This renders the case of *Pugh* v. *Stigler* wholly inapplicable to the case at bar unless the court finds that the answers and cross complaints of the plaintiff in error admitted the allegations of the complaint of the plaintiff below, or that the allegations of her cross complaints are insufficient to sustain a judgment for the plaintiff in error. The answer and cross complaints of the plaintiff in error did not admit the allegations of the complaint of plaintiff below; but, on the contrary, they contained general denial of all the material allegations in that complaint, as is admitted to be true in the opinion of the Supreme Court, on page 131. This, therefore, eliminates the first feature, and, according to the decisions here cited, made it wholly improper and erroneous to sustain said demurrer. On the other hand, it is advanced in this opinion that the matters set forth in the cross complaints of the plaintiff in error did not

constitute grounds sufficient to sustain a judgment for the plaintiff in error.

As shown by the preceding decisions, and, in fact, the general law on that subject everywhere, a motion for a judgment on the pleadings and a demurrer to the pleadings admit as true all the charges and allegations contained in the pleadings thus demurred to, which are well pleaded; and the same also presents a proposition of law and not of fact; and in passing upon the same, the trial court and the appellate court are governed alone by the law arising out of the facts and allegations thus pleaded.

This brings us back again to the material allegations of the complaint of the plaintiff below and of the cross complaints of the plaintiff in error.

In *Bartholomew* v. *Guthrie*, 81 Pac. 491, heretofore cited, the Supreme Court of Kansas held:

> "A general demurrer to certain defenses of an answer *searches the record*, and if the petition does not state facts sufficient to constitute a cause of action, the demurrer should be sustained to the petition."

This was the common law rule of pleading. This permits us to look at the petition of defendant in error and, if found deficient, the demurrer should be applied to his own petition and sustained as to it, if it does not state a cause of action.

Section 124, page 998, Vol. 2 of Wilson's Statutes, provides that where an action is "founded on

an account or a note, bill, other written instrument, as evidence of indebtedness, a copy thereof must be attached to and filed with the pleading. If not so attached and filed, the reason thereof must be stated in the pleading."

The petition purports to file a copy of the note, but none was ever filed and attached thereto; nor was any copy of the mortgage sought to be enforced; nor was there any "reason" given why the same was not filed or attached, as so required by law. The note is nowhere described in the petition. It just alleges that "Jake F. Arnold is indebted to this plaintiff in the sum of two thousand and ninety ($2,090.00) dollars, * * * on a certain promissory note," etc. It does not state that Jake F. Arnold is the maker of that note, or what connection he ever had with it. The allegation that he "is indebted to this plaintiff in the sum of two thousand and ninety dollars," is, therefore, simply a conclusion of law, to be determined by the court. There is nothing in the petition to show whether the note was due or not, other than the allegation that it was then "past due and wholly unpaid." The note should have been described so the court could determine for itself whether the note was or was not due, and not be obliged to take the petitioner's word for it. A pleading should carry on its face every fact necessary to constitute the cause of action, without leaving things to inference or conclusions of law or the

opinion of the party himself, or attorney. If it does not do this, it does not state a cause of action, and a court cannot give a valid judgment upon the petition; and, where it does do so, the injured party can take advantage of it for the first time in the Supreme Court.

Again, the petition does not show that Jake F. Arnold ever had any right, title or interest in the 80 acres of land in controversy, or a right to give said mortgage thereon; but it does allege that Martha Adkins, W. B. Adkins and the Richardson Dry Goods Company "have, or claim to have, some interest in, or lien on, the said mortgaged premises, which, if any, accrued since the lien of the said mortgage." Here is an open admission on the face of the petition that these parties have, or claim, some interest in "the mortgaged premises;" but it does not disclose what that interest is. Yet, in the very face of such an admission, and without disclosing that interest, these lands are asked to be sold under this mortgage and these parties "forever barred and foreclosed of all right, claim or equity of redemption in the said property and every part thereof." Such loose allegations as these are not binding upon Martha Adkins, W. B. Adkins and the Richardson Dry Goods Company, and a final judgment against them, on such petition, would not have bound them or the matters thereto pertaining become *res adjudicata*. The petition was, therefore,

plainly demurrable in the first instance; and, if the demurrer to the answer "searches the record" for the first error, it will embrace this feature, and show that no such judgment should have been given on that petition.

In *Kimmell* v. *Powers*, 19 Okla. 339, it was held that "where a petition neither states a cause of action in equity nor at law, a demurrer thereto should be sustained"; and in *State of Kansas* v. *Board of Commissioners*, 12 Kans. 426, Point 1, Supreme Court of Kansas it was held:

> "A demurrer to an answer, on the ground that the answer does not state facts sufficient to constitute a defense to plaintiff's cause of action, may be carried back and sustained as against the petition where the petition does not state facts sufficient to constitute a cause of action."

To the same effect is *Stratton* v. *McCandless*, 27 Kans. 299, where this and other cases are cited as authority.

We must then, under these authorities, look first to the petition of the plaintiff below and ascertain whether the same states a cause of action or not; if not, then the demurrers of the plaintiff below were fatal to his own cause of action, unless the omitted material allegations thereof were supplied in the answers and cross petitions of the plaintiff in error. We respectfully submit that said petition does not contain facts sufficient to sustain his action, and

that said answers and cross petitions did not supply any needed facts; but on the contrary, that said answers and cross petitions set up matters which unquestionably entitled the plaintiff in error to all the relief she thereby prayed for.

In its final decision in the case at bar, said Supreme Court observed:

> "The defendant also urges that the sustaining of the demurrer was error, because her answer contained a general denial. But in this case, while this is true, yet her affirmative averments are inconsistent with the general denial, and admit all the allegations of plaintiff's petition, in so far as they become material to her, in the event the court finds the law contrary to her assertion of it, and that the deed she admits executing did in law pass title to the lands to the mortgagor. The question of the validity of the mortgage as between the parties to the mortgage was not material to her, if, as a matter of law, she had conveyed all her title and estate in the lands, and this is shown by her cross petition. Her pleading must be considered and construed as a whole, and, when so considered, the court did not commit error in sustaining the demurrer on this ground, if it was correct in its construction of the deed set up, which main question we will now proceed to determine."

As before stated, this motion for a judgment and demurrers presented simply propositions of law, as they admit all the facts thus presented by the plaintiff in error in her said answers and cross

petitions, and it does not thus devolve upon the court to find any facts, but simply to determine the law arising upon the facts thus admitted. Yet, in the face of this condition, the Appellate Court of said state advances the above statement that "where affirmative averments are inconsistent with the general denial, and admit all the allegations of plaintiff's petition, in so far as they become material to her, in the event the court finds the law contrary to her assertion of it, and that the deed she admits executing did in law pass title to the lands to the mortgagor. The question of the validity of the mortgage as between the parties to the mortgage was not material to her, if, as a matter of law, she had conveyed all her title and estate in the lands, and this is shown by her cross petition." We deny that her cross petitions show that she had conveyed all her title and interest in the lands; and, therefore, the premises on which this affirmation was based being erroneous, the result would necessarily be erroneous. Her cross petitions show conclusively (under the state of pleadings in the case) that the plaintiff in error was the owner of this land in fee simple, and which was derived to her under the Creek laws of descent and distribution; "that this defendant (plaintiff in error) is the owner in fee simple of said lands thus described in said petition herein sought to be subjected to the payment of said note and mortgage therein described; that this defendant has at no time or place, made, executed or de-

livered any deed or conveyance of any kind to said Jake F. Arnold, or anyone else, for said lands thus mentioned in said petition or any part thereof; and that this defendant is now and ever has been since said lands were thus segregated as aforesaid, in the full and complete possession of said lands and claims the same as her own in fee simple"; "that prior to the 23rd day of February, 1907, said W. B. Adkins pretended to make and execute to said Jake F. Arnold a deed for said north half of the southeast quarter of section thirteen (13), township eight north, range nine east, in Hughes County, and this defendant signed said deed as the wife of said W. B. Adkins for the purpose only of relinquishing her dower in said lands described in said deed, when, in fact said W. B. Adkins had no right, title, or interest in said lands and this defendant then nor at any other time had any dower therein, but had, held and owned the fee simple title thereto; * * * that said deed conveys to said Jake F. Arnold no right, title or interest in said lands, but that said deed, as well as said mortgage mentioned and described in plaintiff's petition, are clouds upon the title of said land therein described as belonging to this defendant, and this defendant asks that the same be cancelled and set aside as to this defendant and remove the same as clouds upon said title." She then sets forth said deed *in haec verba*, which on its face empressly provides that "I, Martha J. Adkins, wife of said W. B. Adkins, do hereby release and quit-

claim unto said party of the second part, his heirs and assigns forever, all of my right, claim or possibility of dower in or out of aforesaid property." And the acknowledgment thereto attached further provides and shows, that: "And I further certify that on this day also voluntarily appeared before me, the undersigned notary public, Martha J. Adkins, the wife of said W. B. Adkins, well known to me as the person whose name appears upon the within and foregoing deed, and in the absence of her said husband declared that she had of her own free will signed the relinquishment of dower therein expressed, for the purposes and consideration therein contained and set forth without compulsion or undue influence of her husband;" and then by her second amended answer and cross petition, as shown on pages 31 and 32 of the record, she alleges, in effect, that she had never received any consideration whatever for said deed or land nor any part whatever of the consideration therein mentioned"; "nor has she, the said defendant, at any time or place, or in any way, form or manner, either directly or indirectly, received any consideration of any kind, character or description whatever, for the execution of said deed or for the said lands therein and in said amended answer and cross petition mentioned and described, or by virtue of said deed having been so executed and said lands having been thus attempted — be conveyed by said deed or through its force and effect."

All of these charges, statements and facts are taken as absolutely true on this motion for a judgment on the pleadings and these demurrers to said answers and cross complaints; and establish themselves as proven facts, and were absolutely binding, not only on the plaintiff below, but likewise upon the trial, appellate and state courts, and they were not at liberty to ignore these established facts and the law that governs them, and render judgment in favor of said Henry C. Arnold and against the plaintiff in error, and to do so was not due process of law under either the Constitution of the State of Oklahoma, or the 14th Amendment to the Constitution of the United States. And we respectfully submit that when the plaintiff in error was the true owner in fee simple of said lands and was, from their segregation, always in the full and complete possession thereof and that she never received any consideration whatever for said lands or deed, and never intended to release anything but her dower therein, as thus alleged as facts in her pleadings, all of which was thus admitted to be true and correct by said plaintiff below by his said motion and demurrers, it was not competent for said state courts to thus deprive the plaintiff in error of her lands, without any compensation whatever and take the same out of her possession and subject said lands to the payment and satisfaction of this unproven claim or indebtedness of said Jake F. Arnold to said Henry C. Arnold; and that such proceedings are in

violation of and repugnant to said provisions of said respective constitutions referred to under this assignment of error.

It is an old principle of law that the allegations must be sustained by the proof adduced in the case, *Crocket* v. *Lee*, 5 L. ed. 513, where it is held that "It is a settled rule that the decree must conform to the allegations in the pleadings, as well as to the proofs in the cause;" *Carneal et al.* v. *Banks*, 1 L. ed. 297, where this court held that "A decree must be sustained by the allegations of the party, as well as by the proofs in the cause, and cannot be founded upon a fact not put in issue by the pleadings;" *Harrison et al.* v. *Nixon*, 9 L. ed. 202, where it is held that:

> "Every bill must contain in itself sufficient matter of fact, *per se*, to maintain the case of the plaintiff. The proofs must be according to the allegations of the parties, and if the proofs go to matters not within the allegation, the court cannot judicially act upon them as a ground for decision; for the pleadings do not put them in contestation."

In the case of *Railroad Co. et al.* v. *City of Washington et al.*, 19 L. ed. 895, this court observed:

> "It is hardly necessary to repeat the axioms in the equity law of procedure, that the allegations and proofs must agree, that the court can consider only what is put in issue by the pleadings, that averments without proofs and proofs without averments are alike unavailable, and that the decree must conform to the

scope and object of the prayer, and cannot go beyond them. Certainly without the aid of a cross bill the court was not authorized to decree against the complainants the opposite of the relief which they sought by their bills. That is what was done by the decree under consideration.

There is a large class of cases in which it has been held that objections not taken in the court below will not be allowed to be taken in this court. We do not intend to impugn this doctrine or to narrow the limits of its just operation. But where there is such a combination of errors, and errors of so grave a character as those which mark the record in the case before us, this principle can have no application."

In *Barnes* v. *Chicago, Milwaukee and St. Paul Railway Co.*, 30 L. ed. 1128, this court held:

"Every decree in a suit in equity must be considered in connection with the pleadings; and if its language is broader than is required, it will be limited by construction so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided."

In *Anglea* v. *McMaster et al.*, 17 Okla. 501, it was held:

"A judgment which is entirely out of the issue in the case and upon a matter not submitted to the court for its determination, is a nullity and may be vacated or set aside at any time, on motion of a party, or any person affected thereby."

In 23 Cyc. 816 it is observed:

> "A judgment must accord with and be warranted by the pleadings of the party in whose favor it is rendered; if it is not supported by the *pleadings it is fatally defective*,"

citing a long list of decisions; and on page 818 thereof it is further observed:

> "To render a valid judgment the court must have jurisdiction not only of the party and the general subject matter, but also the particular question which it assumes to decide, or of the particular remedy or relief which it assumes to grant; and a judgment of a court upon the subject which may be within its general jurisdiction, but which is not brought before it by any statements or claim of party, and is foreign to the *issues submitted for its determination, is void*,"

citing as authority decisions of various states of the Union and from this court, among which are: *Reynolds* v. *Stockton*, 140 U. S. 254, 35 L. ed. 464; *Barnes* v. *Chicago etc. R. Company*, 122 U. S. 1, 30 L. ed. 1128; *Graham* v. *LaCrosse etc. R. Company*, 3 Wall. 704, 18 L. ed. 247, and others.

In *Hovey* v. *Elliott et al.*, 167 U. S. 409, 42 L. ed. 215, this court held:

> "*1.* Due process of law signifies a right to be heard in one's defense.
>
> *2.* The power of the court to deny a favor to a person in contempt does not include the power to refuse to a person in contempt the right to defend in the principal case on the merits.

3. A decree *pro confesso* entered after striking defendant's answer from the files as a punishment for his contempt in refusing to obey an order of the court is void for want of due process of law."

Here the defendant was in contempt of court and his answer in the case was stricken from the files and a decree entered against him; but this court held that such a judgment was void for want of due process of law, and that due process of law signifies a right to be heard in one's defense.

In the case of *Windsor* v. *McVeigh*, 23 L. ed. 914, this court held:

"*1.* A sentence of a court, pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

2. The jurisdiction acquired by the seizure of property, in a proceeding *in rem* for its condemnation for alleged forfeiture, is not to pass upon the question of forfeiture absolutely, but to pass upon the question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges for which the forfeiture is claimed. To that end, some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential.

3. In proceedings before the District Court, in a confiscation case, monition and notice were issued and published; but the appear

ance of the owner, for which they called, when made, was stricken out, his right to appear being denied by the court. *Held*, that the subsequent sentence of confiscation of his property was as inoperative upon his rights as though no monition or notice had ever been issued. The legal effect of striking out his appearance was to recall the monition and notice as to him.

4. The doctrine, that where a court has once acquired jurisdiction it has a right to decide every question which arises in the cause, and its judgment, however, erroneous, cannot be collaterally assailed, is only correct when the court proceeds after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it."

In this case the proceedings held to confiscate the property of the defendant, who, having been warned to appear therein, filed his answer thereto, which was stricken out of the files on motion of the district attorney on the ground that he was at the time of the filing of the same "a resident within the City of Richmond, within Confederate lines, and a rebel," etc. The court sustained the motion and entered its decree, condemning the property as forfeited to the United States.

In delivering this opinion, Justice FIELD observed:

"A denial to a party of the benefit of a notice would be, in effect, to deny that he is

entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether It would be like saying to a party: Appear, and you shall be heard. And when he has appeared, saying: Your appearance shall not be recognized, and you shall not be heard. In the present case, the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was, in fact, a mere arbitrary edict, clothed in the form of a judicial sentence.

The law is, and always has been, that whenever notice or citation is required, the party cited has the right to appear and be heard; and when the latter is denied, the former is ineffectual for any purpose. The denial to a party in such a case, of the right to appear, is in legal effect the recall of the citation to him. The period within which the appearance must be made and the right to be heard exercised, is, of course, a matter of regulation, depending either upon positive law, or the rules or orders of the court, or the established practice in such cases. And if the appearance be not made, and the right to be heard be not exercised, within the period thus prescribed, the default of the party prosecuted, or possible claimants of the property, may, of course, be entered, and the allegations of the libel be taken as true for the purpose of the proceeding. But the denial of the right to appear and be heard at all is a different matter altogether."

And in another part of this decision, said justice further observed:

> "So departure from established modes of procedure will often render the judgment void: thus, the sentence of a person charged with felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the Chancellor. And the reason is that the courts are not authorized to exert their power in that way. * * *"
>
> "It was not within the power of the jurisdiction of the District Court to proceed with the case, so as to affect the rights of the owner after his appearance had been stricken out, and the benefit of the citation to him thus denied. For jurisdiction is the right to hear and determine: not to determine without hearing. And where, as in that case, no appearance was allowed, there could be no hearing or opportunity of being heard, and, therefore, could be no exercise of jurisdiction. By the act of the court, the respondent was excluded from its jurisdiction.
>
> Judgment of the Corporation Court is affirmed."

Many other decisions of this court to like effect might be cited as conclusive authority that due process of law guaranteed by the Constitution of the United States requires not only that the parties to a suit should have notice thereof, but likewise a right and opportunity to be heard and defend their

rights therein, in the court where such suit is pending; but we believe these two cases are sufficient on that point. Undoubtedly had the answers and cross petitions of the plaintiff in error been stricken out of the files in the case at bar, and a final judgment and decree thereupon rendered against her, subjecting said lands to the payment of said mortgage and note, that, on a writ of error to this court, it would have reversed the whole proceedings, because not due process of law, as shown by these cases. But such answers and cross petitions were not stricken from the files, yet we respectfully submit that practically the same result followed when the state courts refused to follow and recognize the legal force and effect of said answers and cross complaints and of the legal effect of a motion for judgment on the pleading and a demurrer to such pleadings. It is true said Supreme Court makes it appear in their opinion that they decided the case on the admissions in said answers and cross petitions. But these answers are in the record and do not bear out these contentions of that court. In our judgment there is only one fact admitted in said answers and cross petitions which can be construed as antagonistic to the rights of plaintiff in error, and that is the simple statement, "this defendant signed said deed as the wife of said W. B. Adkins." But this is only a part of the allegation which contained it, for it goes further and states: "For the purpose only of relinquishing her dower in said lands described in

said deed, when, in fact said W. B. Adkins had no right, title or interest in said lands and this defendant then nor at any other time had any dower therein, but had, held and owned the fee simple title thereto." She further charges that at the time of making said deed and prior thereto, she and said W. B. Adkins were husband and wife and were then living and residing together; and that "said defendant, W. B. Adkins, is not and never was a Creek citizen, either by birth or by adoption into said Creek tribe, but is now, and ever has been a noncitizen of said tribe and nation." All such facts were taken as true on such pleadings and were conclusive on said state courts, and they had no right, power or judicial authority to so ignore them and decree contrary to the facts thus fully proven and established. To do so was, in effect and legal consequence, the same as striking her answer out of the files entirely. By the decisions heretofore cited it is shown that in the jurisdiction of said state courts and as a part of the practice and procedure therein, a motion for a judgment on the pleadings and a demurrer to the pleadings, admit that all the facts and statements well pleaded are true and correct; but the confirmation of the trial court by said Supreme Court is conclusive that this rule of practice, and the law which governs such matters, were not followed or adhered to by said State Supreme Court; and we respectfully submit that said court had no power or authority to arbitrarily decide this

case in such a matter; that, in the language of Justice FIELD, in *Windsor* v. *McVeigh*, such decision "was, in fact, a mere arbitrary edict, clothed in the form of a judicial sentence;" and, as in that case so held, was not due process of law, and should be reversed.

Under the Federal Constitution and decision of this court, due process of law imports compliance with established methods of procedure. *Ennoyer* v. *Neff*, 95 U. S. 733, 24 L. ed. 572; *Scott* v. *McNeal*, 154 U. S. 34, 46, 38 L. ed. 896, 897; *Walker* v. *Sauvinet*, 92 U. S. 93, 23 L. ed. 679, where it is held:

> "The requirement of the Constitution, that a person cannot be deprived of his property without due process of law, does not imply that all trials in the state courts affecting the property of persons must be by jury. 4. This requirement of the Constitution, is met, if the trial is had according to the settled course of judicial proceedings. 5. What is due process of law in the states is regulated by the law of the state."

In Volume 5 of the Encyclopedia of United States Supreme Court Reports, pages 616 and thereafter, it is observed:

> "E. *Due Process in Judicial and Administrative Proceedings.* 1. *General Rules and Principles.* a. *Each State Prescribes Its Own Procedure:* As we have seen in a former part of this article, due process of law or 'law of the land' is, generally speaking, that which is pre-

scribed by the Acts of Congress, and by laws enacted by the legislatures of the several states. The same general statement applies to due process in judicial and administrative proceedings. Each state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, nor conflict with specific and applicable provisions of the Federal Constitution.

As to Forms of Procedure: The most important of these fundamental rights, perhaps, is the right to notice and to an opportunity to be heard in one's defense, and it is frequently said that the fourteenth amendment does not control the power of a state to determine the form of procedure or the process by which legal rights may be ascertained and enforced, provided the method adopted gives reasonable notice and affords a fair opportunity to be heard.

b. *Requirements Satisfied by the Regular Administration of Law Through the Courts of Justice.* (1) *Generally:* It may be stated, then, that law, in its regular course of administration through the courts of justice in the several states according to the settled course of judicial proceedings, is due process, and the requirements of the fourteenth amendment are satisfied when this is secured by the law of the state operating upon all persons alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice. It is not possible to hold that a party has, without due process of law,

been deprived of his life, liberty, or property, when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the mode of procedure applicable to such a case.

(2) *Qualification of Rule; Regard to be Had to Substance and Not to Form.*—The rule here stated is true in the general sense that when the state has provided for the enforcement of private and public rights in the ordinary tribunals of justice by a proceeding which conforms to the recognized forms and principles of law, it has provided a due process of law. It is subject to the qualification that the judicial departments of the government, in administering the process provided, are themselves subject to the restriction of the due process requirements; that a state may not, by any of its agencies, disregard the prohibition of the fourteenth amendment; that the judgment of a state court, or other tribunal of last resort, is the act of the state, and that although the judicial authorities may keep within the letter of the statutes regulating the forms of procedure, and give the parties the fullest opportunity to be heard and a trial in strict compliance with the requirements of the state law, yet, in determining what is due process of law, and whether it has been denied in a given proceeding, the courts look to substance and not to form, and will interfere whenever necessary for the protection of private rights against an arbitrary exercise of power, especially if it results in the taking of private property without compensation."

In support of this text, the author cites numerous decisions of this court, which may be found in the footnotes and are too numerous to be given here.

In *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676, Point 3, it was held by this court that:

> "*3.* The inhibition contained in the 14th amendment means that no agency of the state, nor of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's powers, his act is that of the state. Otherwise the constitutional inhibition has no meaning and the state has clothed one of its agents with power to annul or evade it."

On page 513 of Vol. 5 of said United States Encyclopedia, etc., the author further observes:

> "c. *Private Property Not to Be Taken Without Just Compensation.* Another principle of due process of law is that no man's property or right to property shall be taken for the benefit of another, or for public use, except upon the payment of just compensation. While this principle is not embodied in the fourteenth amendment in express language, as it is in the fifth, it is well settled that the inhibition against the deprivation of property without due process of law implies that it shall not be taken

without compensation, and that such taking is, therefore, forbidden to the states as well as to the national government,"

citing as authority a long list of decisions of this court to that effect; and on pages 572 and 573 thereof, it is further observed:

"(2) *Due Process Requires That Compensation Be Made for Property Taken*—(a) *Generally.*—Prior to the Constitutional Amendments.—By the general law of European nations and the common law of England it was a qualification of the right of eminent domain that compensation should be made for private property taken or sacrificed for public use. It seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle.

Same; as to Vested Rights.—It has been held, however, that prior to the adoption of the fourteenth amendment there was nothing in the Constitution of the United States which prohibited a state from enacting a statute divesting vested rights or property provided such statute did not impair the obligation of any contract.

Subsequent to the Adoption of the Constitution.—The constitutional provisions of the United States and of the several states which declare that private property shall not be taken for public use without just compensation were

intended to establish this principle beyond legislative control. The fifth amendment of the federal Constitution expressly provides that private property shall not be taken without just compensation. Where, therefore, the government, in emergencies, takes private property into its use, a contract to reimburse the owner is implied. In the fourteenth amendment the provisions regarding the taking of private property is omitted and the prohibition against the state is confined to its depriving any person of life, liberty or property without due process of law. Nevertheless it is well settled that the right to compensation is of a fundamental character and that the due process of law prescribed by the fourteenth amendment requires compensation to be made or secured to the owner when private property is taken by a state or under its authority for public use."

"*Neither Can State Authorize Private Persons or Corporations to Take Property Without Compensation.*—The permission or command of the state can give no power to invade private rights, even for a public *purpose without payment of compensation.*"

again citing numerous decisions of this court in support of this text, among which are *Society, etc.*, v. *New Haven*, 5 L. ed. 662, and *Vanhorne* v. *Dorrance*, 2 Ball. 304, 310, 1 L. ed. 391, in which there is a very learned discussion of the legal force and effect of constitutions, the power and authority of co-ordinate branches of the state therefrom arising, and the power and authority to appropriate or take private property for private or public pur-

poses, and where it is pointed out that neither in England nor this country can private property be taken for private ends, either with or without condemnation, and cannot be taken for public use without just compensation as provided for in said constitutions.

In short, we have tried to establish by authority that due process of law requires a fair trial in which the party has due notice and is given an opportunity to be heard and prosecute or defend his legal rights; and that, too, in accordance with the well established judicial procedure, pleading and practice of the jurisdiction where the case is tried; and that unless such trial is had in accordance with this principle, and a party is deprived of his property contrary to such principles and procedure, and without just compensation, such judgment or decree is null and void as being contrary to, and in violation of, the fourteenth amendment to the Constitution of the United States. In support of this position, we have tried to show that in the case at bar the procedure before the trial court and likewise before the Supreme Court of said state, was not in accordance with the well established procedure, pleading and practice in judicial proceedings in the State of Oklahoma; but, on the contrary, the same is the reverse of such proceedings by which the plaintiff in error has thus been deprived of her property without any compensation whatever and without due process of

law as provided for in said amendment and in section 7 of article 2 of the Constitution of Oklahoma.

In the case at bar there is no claim upon the part of Henry C. Arnold that he was an innocent purchaser of said lands, nor did he charge or show that said lands ever belonged to his mortgagor, Jake F. Arnold. He could not very consistently claim to have been an innocent purchaser if it was true as so alleged by the plaintiff in error that she was the owner in fee simple of said lands and had always been in the possession thereof from the time the same was segregated. This allegation of ownership and possession as well as all said other allegations contained in her said answers and cross petitions were, by said motion for judgment and demurrers of said defendant in error, taken as true and thereby were fully established as proven facts in the case. Such facts establish that the plaintiff in error was the true owner of these lands; that she was then and always had been since such segregation in the full possession and control of said lands; that she never received any compensation whatever for said lands or said deed; and signed said deed for the purpose only of alienating whatever dower she might have in said lands. These facts being true, and thus fully established in the case, we respectfully submit that, for the reasons given before referred to and established by the decisions herein cited, that the judgment of said trial court and the

affirmation thereof of said Supreme Court of the State of Oklahoma, were without due process of law, and resulted in thus depriving the plaintiff in error of her lands without any compensation whatever, and contrary to said provisions of said respective constitutions; and for that reason we ask that the same be reversed and remanded to said courts for correction.

The remaining Assignments of Error in this Writ of Error are as follows:

"*Second.* Said Supreme Court also erred in holding and deciding that plaintiff in error, 'the sole owner of the land, joined in the operative words of the grant, usually designated as the granting clause;' and that 'In the light of the Arkansas decisions and in reason, we believe the deed in this case was sufficient to pass title, as between the parties and their privies, although not acknowledged in such form as to entitle it to registration under the laws enforced in Indian Territory,' and that 'The answer and cross petition of the defendant did not state a defense, cause of action, or grounds for relief as sought, and that the demurrer to the same was properly sustained and the judgment of the trial court should therefore be affirmed'."

"*Third.* The said Supreme Court erred in holding and determining that 'under the laws in

force in Indian Territory prior to statehood, a married woman could convey the title to her real estate, the same as if she were single; and where she joins her husband in a deed for her land, and also relinquishes dower, the deed will convey the fee, though she acknowledges only the relinquishment of dower'."

"*Fourth.* The said Supreme Court erred in holding and deciding that 'sections 648 and 659 of chapter 27 of Mansfield's Digest of the laws of Arkansas put in force in the Indian Territory by Act of Congress in Feb'y. 19, 1903 (32 U. S. Stat. L. 841), were, in so far as they affect the conveyance by a married woman of her lands, inconsistent with section 4621, chapter 104 of Mansfield's Digest, which was in force prior thereto, and to the extent of such inconsistency said sections 648 and 659 were not in force in Indian Territory prior to statehood'."

"*Fifth.* Said Supreme Court also erred in holding and deciding in said cause that 'Under the laws in force in Indian Territory, prior to statehood, a deed by a married woman of her lands wherein she joins her husband in the operative words of grant, but acknowledges relinquishment of dower only, is not sufficiently acknowledged to entitle it to record, but it is sufficient, as between the parties or privies to convey the fee'."

"*Sixth.* That said Supreme Court erred in holding and deciding that the alleged deed purporting to have been made, on the 15th day of January, 1907, by W. B. Adkins to Jake F. Arnold for the lands in controversy, and joined therein by the plaintiff in error to relinquish her right of dower only to said lands, conveyed the fee simple title thereto and thereby deprived the plaintiff in error of all her right, title and interest in said land, *1st*, because said deed was embodied in the answer and cross petition of the plaintiff in error, and shows upon its face that it purports to have been made and executed on the 15th day of January, 1907, which fact discloses that the same was so made within the five years' restrictive period as provided in said section 7 of the Original Creek Treaty and section 16 of said Supplemental Creek Treaty, and the plaintiff in error being a Creek citizen and receiving said lands under said treaty the said deed was therefore null and void; *2nd*, because said deed shows upon its face that it was not made and executed by said plaintiff in error in the way and manner provided for in said chapter 27 of Mansfield's Digest of the Statute of Arkansas, and especially sections 648 and 659 thereof, and said deed is therefore absolutely null and void; and, *3rd*, because it is charged and averred in the answers and cross petitions of said plaintiff in error in

effect that she never made, executed or delivered said deed to said Jake F. Arnold; that she joined in the same only for the purpose of alienating her right of dower in said lands; that she never at any time, place or condition, neither directly nor indirectly, received any consideration whatever for said lands under said deed, or by reason thereof or otherwise; and that at the time of filing said answer, and at all other times since said lands had been segregated, plaintiff in error was in possession of these lands and claiming the same as and for her own in fee simple; and that said decision of said court is in violation of the rights and interest of the plaintiff in error in and to said lands and denies to her the protection and validity of said Acts of Congress and sections herein referred to, in this, that said facts set up in said answer and cross petition being taken as true upon said demurrer thereto the said decision of said court results in thus depriving the plaintiff in error of all her right, title and interest in said land, without any compensation whatever, and without ever having delivered said deed to said Jake F. Arnold or the possession of said lands thereunder to him or any one else, but simply because the plaintiff in error signed said deed for the purpose alone of alienating her right of dower therein; and which said decision plaintiff in error respectfully submits

is not only in violation of said Acts of Congress and section above referred to but denies the validity of their existence as applicable to the merits of this case and denies to the plaintiff in error the legal force and effect of the same, and deprives the plaintiff in error of her right or property herein without due process of law, as guaranteed to her by said section 1 of 14th amendment to the Constitution of the United States and section 7 of article 2 of the Constitution of the State of Oklahoma."

For convenience and to curtail the size of this brief, we will discuss these five remaining assignments under the following heads:

First. That said deed to said Jake F. Arnold was null and void, because, under the allegations in her said answers and cross complaints, said deed was never made, executed or delivered to said Jake F. Arnold; that plaintiff in error never received any consideration therefor, or for said lands therein described; that she at that time was in possession of said lands and ever thereafter retained such possession and claimed said lands as her own in fee simple.

Second. That said deed bears date the 15th of January, 1907, and said lands were derived to the plaintiff in error under an Act of Congress known as the Original Creek Agreement, which put

in force in the Indian Territory the Creek laws of descent and distribution of said Creek Nation; and said lands being thus inherited by plaintiff in error from her said deceased daughter, Otheòla Adkins, were restricted in her hands under said Act of Congress and especially section 7 thereof and under section 16 of the Supplemental Creek Agreement, which became effectual on the 7th day of August, 1902, and said deed was therefore null and void when so made, because of said respective Acts of Congress.

Third. That said deed was absolutely null and void for the further reason that the same was not made or executed in the way and manner provided for in chapter 27 of the Statutes of Arkansas of 1884, and especially as therein provided for in sections 648 and 659, which said chapter was put in force under an Act of Congress approved on the 19th day of February, 1903, the legal effect and consequence of which was discussed and considered in the opinion of said Supreme Court and by which the plaintiff in error was denied her right, title and interest in said lands.

FIRST PROPOSITION:

That said deed to said Jake F. Arnold was null and void, because, under the allegations in her said answers and cross complaints, said deed was never made, executed or delivered to said Jake F. Arnold; that plaintiff in error never received any consideration therefor, or for said lands therein described; that she at that time was in possession of said lands and ever thereafter retained such possession and claimed said lands as her own in fee simple.

The deed in controversy bears date the 15th of January, 1907; and this whole transaction occurred prior to the advent of statehood, which occurred on the 16th of November, 1907. It follows, therefore, that these matters are governed by the law which existed at the time of the transaction. On the 19th of February, 1903, Congress spread over Indian Territory said chapter 27 of Mansfield's Digest of the Statutes of Arkansas of 1884, which relates to "Conveyances of Real Estate;" and this is the chapter as we contend under which this deed was made and which governs this whole matter. The deed on its face, as shown on page 29 of the record, shows that the same was the act of W. B. Adkins, who alone warrants the title thereto, and that the plaintiff in error simply released and quit claimed all of her right, claim or possibility of dower in said lands; and the acknowledgment to said deed shows that

"She had of her own free will signed the relinquishment of dower therein expressed, for the purposes therein contained and set forth." She says in her answer that she "signed said deed as the wife of said W. B. Adkins for the purpose only of relinquishing her dower in said lands." This allegation and the face of said deed (which were not denied or disputed on the trial of the case) shows that the relinquishment of dower was all that passed, or was intended to pass, by said deed, so far as the same relates to the plaintiff in error. That being true, it was impossible for the fee simple title to said lands to pass under said deed, unless by rules of construction one is permitted to ignore this allegation and these express provisions on the face of the deed itself. This we contend the courts cannot do; for in the trial of cases the courts are bound by the allegations, proofs, and the law incident to the case; and a judgment unsupported by the same is simply a nullity, as shown by the decisions heretofore cited. It is also alleged that the plaintiff in error received no consideration whatever for said land or deed. The face of the deed recites the consideration "of Fifteen Hundred Dollars to me paid by Jake F. Arnold," etc. But W. B. Adkins is the real grantor in that deed and might have received the fifteen hundred dollars, for all that is shown in the record in this case, or he might not have received anything as there is no proof in the case on that point. But by the second amended answer of the plaintiff in error,

she puts it plainly in issue that she did not receive the fifteen hundred dollars there recited or any other consideration for these lands or deed. By the pleadings this thereby became an admitted fact in the case and was sufficient to avoid the deed as to her because she was still in the possession of the lands and had never received any consideration for them or the deed. Here is a total want of consideration for this undertaking; and as the plaintiff in error never made, executed or delivered the deed to Jake F. Arnold or anyone else but always held the possession of said lands, the deed thereby became void as to her, *first*, because no consideration whatever was paid for it, and, *second*, because according to the face of the deed and her allegation, she never undertook to sell or convey anything except to relinquish her dower in said lands. She had no dower therein but was the owner in fee simple of said lands at the time of making said deed. It is apparent from the deed and the record in this case, that W. B. Adkins supposed he had inherited these lands from his child instead of his wife, and, perhaps, she was then under the same impression. Otherwise W. B. Adkins would not have warranted the title and assumed to be the maker of said deed; nor would the plaintiff in error have confined herself simply to the relinquishment of dower. This impression is further carried out from the evidence as shown in the notary's certificate to the deed wherein he certifies

that the plaintiff in error "declared that she had of her own free will signed the relinquishment of dower therein expressed," etc. These facts are nowhere disputed but are admitted by the pleadings in this case. These matters are therefore, now beyond dispute; and the result is that the decision of said state courts deprived the plaintiff in error of her property and estate in said lands without any consideration whatever. And, too, this is true regardless of whether the plaintiff in error did, or did not, receive any consideration for the execution of said deed, for the deed shows, and so does her allegation undisputed, that her signing said deed was solely for the purpose of relinquishing her dower in said lands and not for the purpose of conveying the fee simple title therefor. Hence, again, said judgments and decrees of said state courts were erroneous wherein they sought to deprive, and did deprive, the plaintiff in error of the fee simple title to said lands. The legal proposition that a contract, agreement or undertaking, without any consideration whatever, cannot be enforced in a court of justice, is so old and well established that we presume that citation of authority to that effect is not needed, especially where the same is simply executory and each party remains in *statu quo*.

We will next take up the decisions of the Supreme Court of Arkansas, from which state this statute in controversy was taken, and apply the de-

cisions arising under chapter 27 of those statutes, to the case at bar.

In the case of *Little* v. *Dodge*, 32 Ark. 453, it was held that any substantial deviation from the forms prescribed by the statute from the conveyance of real estate of married women will render the deed invalid. In *Wentworth* v. *Clark*, 33 Ark. 432, and *McGehee* v. *McKenzie*, 43 Ark. 156, it was held that prior to the Constitution of 1874, the deed of a married woman, not acknowledged according to the statute, is absolutely void and a nullity, and not capable of confirmation. In *Rogers* v. *Brooks*, 30 Ark. 612, it was held that the husband's contract to sell the wife's land, though known and *assented to by her*, was not binding on her or her heirs; that she could only bind herself by executing a deed in the form prescribed by law. In the case of *Conner* v. *Abbott*, 35 Ark. 365, the court held that, prior to the Constitution of 1874, a mortgage of a married woman of her lands as a *femme sole*, is void; and, in a suit to foreclose the mortgage, a court of equity will protect her, though she makes no defense against it; that in such case it was the duty of the chancellor to examine her as to her wishes, and to see that her assent is intelligently and freely given. In *Stidham* v. *Mathews*, 29 Ark. 650, and *Wood* v. *Perry*, 30 Ark. 385, it was held that the executory contract or bond of a married woman for the transfer of her lands was void and non-enforceable; and,

in the former, it was held that, under the statute, an acknowledgment upon privy examination of the wife was requisite to the validity of the wife's conveyance or relinquishment of dower, and that the husband must join in her deed. In *Jones* v. *Freed*, 42 Ark. 357, the court held that, in order to pass her title to real estate, under that statute, apt words of conveyance must be used by the married woman. She must join her husband not only in the formal execution of the deed, but in the operative words of the grant; *but, that a relinquishment of dower will not convey the fee.* In *Witter* v. *Briscoe*, 13 Ark. 422, the court held that a married woman may relinquish her dower by joining in her husband's deed and acknowledging the same in proper form; and in *Meyer* v. *Gossett*, 38 Ark. 388, that when a husband's deed is *followed by a paragraph relinquishing dower, and then followed by the signatures of both husband and wife, that this is such joining in the deed as is required for the relinquishment of dower.* That is the case at bar exactly. The face of the deed shows her relinquishment of dower in express words; and it is followed by the signatures of both husband and wife; and in addition thereto for relinquishment of dower is acknowledged in the certificate of acknowledgment to the deed. In this, there is no uncertainty whatever in the deed. Again, in *Dutton* v. *Stuart*, 41 Ark. 101, that court held that a married woman could relinquish her dower in her husband's lands by simply joining in her husband's

deed and acknowledging the relinquishment of dower in the form prescribed in section 659, *without any clause of relinquishment of dower in the deed.*

From this line of decisions, it is apparent that the deed in controversy relinquished only the dower of the plaintiff in error in and to the lands therein described, and that it was never the intention or purpose of the plaintiff in error to transfer, convey or relinquish anything but her dower therein; and that said deed cannot be so construed so as to pass the fee simple title to said lands from the plaintiff in error to the grantee in said deed. The court will bear in mind that in 1874 the people of Arkansas passed a new constitution under which a married woman could sell and dispose of her separate real estate as a *femme sole;* but prior to that time she could sell and convey the same only in the way and manner provided for in said chapter 27, which said chapter was passed before that date and under the whole constitution of said state, and said chapter 27 is found in Mansfield's Digest of the Statutes of Arkansas of 1884; and it was this chapter which Congress put in force by an Act of the 19th of February, 1903. For that reason this chapter alone governed the transfer and conveyance of married women's separate real estate, situated in the Indian Territory, from and ever after the 19th day of February, 1903, until statehood, on the 16th of November, 1907. But we will discuss this matter more

fully under the third proposition, to which we here refer, and ask that the same be considered also in connection with this proposition.

SECOND PROPOSITION:

That said deed bears date the 15th of January, 1907, and said lands were derived to the plaintiff in error under an Act of Congress known as the Original Creek Agreement, which put in force in the Indian Territory the Creek laws of descent and distribution of said Creek Nation; and said lands being thus inherited by plaintiff in error from her said deceased daughter, Otheola Adkins, were restricted in her hands under said Act of Congress and especially section 7 thereof and under section 16 of the Supplemental Creek Agreement, which became effectual on the 7th day of August, 1902, and said deed was therefore null and void when so made, because of said respective Acts of Congress.

In her answers and cross petitions, it is alleged that the plaintiff in error is a Creek citizen by blood (page 21 of the record); that she is a Creek citizen and member of the Creek Nation; that she was living on the 1st day of April, 1899, and as such citizen was entitled to be enrolled and was so enrolled as a Creek citizen of said nation, and thereafter received her allotment as such citizen out of the domain of the said Creek Nation; that said W. B. Adkins was

a non-citizen of said tribe and nation; that of the marriage between her and said Adkins, there was a daughter born named Otheola Adkins, who was the only child of said marriage; that said child thereby became a member of said Creek Nation, and entitled to enrollment as a member thereof and entitled to participate in the general allotment of the domain of said nation, under and by reason of the Original Creek Treaty or Agreement; that said daughter was so enrolled as such citizen for said purposes and her enrollment was duly approved by the Secretary of the Interior in the way and manner provided by law in like cases and thereupon said daughter became endowed with all the rights and privileges of said citizens of said nation in the allotment of the lands of said nation; that said daughter died on the .... day of November, 1901, intestate, without children, brothers or sisters or their descendants but left her surviving said Adkins as her father, and the plaintiff in error, as her mother; that her said mother was the nearest relation of said daughter at the time of her death; that the Creek laws of descent and distribution were in force at the time of the death of said daughter, and were set out in said answer and cross petitions, as shown on page 27 of the record; that plaintiff in error was the sole and only heir of said daughter and that said W. B. Adkins took no right, title or interest in said lands; that by reason of said citizenship and enrollment of said daughter, one hundred and sixty acres

of lands was duly allotted and set apart out of the domain of the said Creek Nation by the Dawes Commission as provided by law, and after the death of said daughter, the patents therefor were duly issued to her heirs and were approved by the Secretary of the Interior, in the way and manner provided by law, and thereafter duly recorded, as so provided in like cases; but the land in controversy was a part of said lands thus allotted to and set apart for said daughter; and that the plaintiff in error as the sole and only heir of said daughter, thereby became the owner in fee simple of said lands thus described in said petition and sought to be subjected to the payment of said note and mortgage, etc.

All of these charges, facts and allegations are taken as true and are thereby fully established by the records and the pleadings in this case, and so arise under the motion for judgment on the pleadings and the demurrers to the answers and cross petitions of the plaintiff in error, by the defendant in error, Henry C. Arnold. W. B. Adkins filed an answer disclaiming any interest, and the suit went by default as to Jake F. Arnold, the grantee in said deed, and the other defendant in error in this cause. Thus, the plaintiff in error thus set up and claimed her right, title and interest in said lands under this Act of Congress, generally known and designated as the Original Creek Treaty or Agreement, which was approved by Congress on the 1st day of March,

1901, and was ratified by said Creek Nation, and thereby became effectual as a law, on the 25th day of May, 1901. This daughter died in November, 1901, which was after this Original Creek Agreement became effectual as a law, and under which Act of Congress the Creek laws of descent and distribution were put in force in said Creek Nation, and were thus in force at the time of the death of this deceased daughter. Section 6 of said Creek laws, as so pleaded in her answer shown on page 27 of the record, is as follows:

> "*Sec. 6.* Be it further enacted that if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested persons, and in all cases where there are no children, the nearest relation shall inherit the property."

These laws are thus pleaded, although in *Scott* v. *Jacobs*, 31 Okla. 109, it in substance held that by section 1 of the Schedule of the Constitution of the State of Oklahoma all laws in force in the Indian Territory at the time of the erection of said state, as to existing rights, there continued in force as if no change had taken place in the form of government; and that the laws of descent and distribution of the Creek Nation, having been made to apply as to the distributive share of allotted lands and funds of said tribe by section 28 of the Act of Congress of March 1, 1901, the courts of this state take judicial

knowledge of such laws and customs of the Creek Nation.

Thus the plaintiff in error alleges that she was the nearest relation to this child at the time of its death; and, under and by reason of said Creek laws of descent, she became the sole and only heir at law of her deceased child. This allegation is taken as true by not being denied or controverted, and that she is the sole heir of her deceased child is so held and decided not only in the case at bar, as shown by the opinion of the Supreme Court of said state, but likewise by other decisions of said Supreme Court such as *DeGraffenreid* v. *Iowa Land and Trust Company*, 20 Okla. 687, 95 Pac. 624; *Irving* v. *Diamond*, 23 Okla. 325, 100 Pac. 557; *Hooks* v. *Kennard*, 28 Okla. 457, 114 Pac. 744, and others.

Thus it is clearly shown that the plaintiff in error not only derived her title to the lands in controversy under said Original Creek Agreement, but that she specifically set up and claimed her right, title and interest therein under said act and said Creek laws of descent thus put in force in the said Creek Nation under sections 7 and 28 of said Original Creek Agreement.

Section 7 of said agreement in part provides:

> "Lands allotted to citizens hereunder shall not in any manner whatsoever, at any time, be encumbered, taken or sold to secure or satisfy any debt or obligation contracted or incurred

prior to the date of the deed to the allottee therefor, and such lands cannot be alienated by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior."

Subsequently to this agreement, Congress passed another act, entitled "An act to ratify and confirm a supplemental agreement with the Creek Tribe of Indians, and for other purposes," which act was approved by Congress on June 30, 1902, ratified by the Creek Nation July 26, 1902, and became effectual by the proclamation of the President of the United States on August 8, 1902. Section 16 of this act, in part, provides:

"Lands allotted to citizens shall not in any manner whatever, or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this Supplemental Agreement, except with the approval of the Secretary of the Interior."

The approval of this Supplemental Agreement (even though that should refer to approval of Congress and not the Creek Nation) took place on the 30th of June, 1902; and the deed in controversy was made and executed on the 15th of January, 1907, which is within the five years, during which time said lands were restricted and the same could not be sold, conveyed or subjected to the payment and satisfac-

tion of any debt or obligation by the allottee or his heirs, as the same is prohibited by said sections 7 and 16 above cited. The plaintiff in error being a Creek citizen by blood and having thus inherited said lands from her deceased daughter, could not, therefore, make and execute a sale or deed for said lands; nor could she in any manner whatever subject said lands to the payment and satisfaction of any debt or obligation, during said five-year restrictions. Said section 16 further provides:

> "Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the ascertion of its invalidity."

The force and effect of such restrictions were upheld and enforced by said Supreme Court of said state in *Western Investment Co.* v. *Kistler*, 22 Okla. 222, 97 Pac. 588; *Baker* v. *Hammett*, 23 Okla. 480, 100 Pac. 1114; *Blakemore* v. *Johnson*, 24 Okla. 544, 103 Pac. 554; *Simmons* v. *Whittington*, 27 Okla. 356, 112 Pac. 1018; *Barnes* v. *Stonebreaker*, 28 Okla. 75, 113 Pac. 913; *Harper* v. *Kelly et al.*, 29 Okla. 809, 120 Pac. 293; and by the Circuit Court of Appeals in *Alfrey* v. *Colbert*, 168 Fed. 231, and *Harris* v. *Hartridge*, 166 Fed. 109, and by this court, in effect, *Taylor* v. *Brown*, 147 U. S. 639, 37 L. ed. 313; *Tiger* v. *Western Inv. Company*, 221 U. S. 286, 55 L. ed. 738.

Yet in the face of all these admitted facts, and the further fact that said deed was thus executed by W. B. Adkins, and joined in by the plaintiff in error in order to relinquish her dower therein, within this five years of restricted period on the alienation of said land by such allottees or their heirs, said state courts undertook to enforce said deed and to subject said lands to the payment and satisfaction of said note and mortgage, directly contrary to the express provisions of these Acts of Congress and these various decisions above cited, and we respectfully submit that such decisions herein by said state courts are erroneous, and being in direct violation of said Acts of Congress and the facts proven in the case, said judgments and decrees are absolutely void, but in form resulted in denying to the plaintiff in error her rights, interests and estate in said lands which were thus derived to her under said Original Creek Agreement.

It is true that it is not charged in her answers and cross petitions that said deed was not approved by the Secretary of the Interior, as is required in said sections 7 and 16 and in section 22 of another Act of Congress pertaining to these matters approved on the 26th of April, 1906, but in Indian affairs of like nature, this court held in *Stevens* v. *Smith*, 10 Wall. 321-327, 19 L. ed. 935, that:

> "It needs no argument or authority to show that the statute, having provided the way in

which these half-breed lands could be sold, by necessary implication prohibited their sale in any other way. The sale in question not only contravened the policy and spirit of the statute, but violated its positive provisions.

It appearing, then, that by the treaty and law in force at the date of the deed, Victoria Smith had no capacity to alienate her land, and the authority to sell being vested in the Secretary of the Interior, and there being no evidence that this officer ever authorized the sale, or in any manner consented to it, it follows that the sale was void, and that the deed conveys no title to the purchaser."

Thus, if said deed had ever been approved by the Secretary of the Interior as required by these Acts of Congress, the burden of proof thereof rested upon the plaintiff below, Henry C. Arnold, to establish that said deed was valid and had been made in conformity to these acts, and especially so after the plaintiff in error had, by her several answers and cross petitions, given the devolution of the title to said lands and her individual rights and interests therein and then set out the deed *in haec verba* showing its date and the time of its execution and which deed shows on its face not to have been approved by the Secretary of the Interior so far as concerned the deed itself. The fact that said plaintiff in error and said lands came under the protection and control of said Acts of Congress, is also shown by the allegations of said answers and cross

petitions of the plaintiff in error. Out of these facts so alleged and thereby proven the law governing the alienation thereof arose; and from them it conclusively appears that said deed was made within said five years' restrictions on the alienation thereof. Therefore, on a demurrer to said answers and cross complaints, it is evident that, instead of the same being thus sustained as they were by said state courts, they ought to have been overruled for various reasons, among which was, because said lands were restricted and inalienable on the 15th day of January, 1907, when said deed was thus made for said lands.

Under this proposition we have proceeded on the theory that the plaintiff in error actually executed said deed, but, in fact, not admitting but denying the same, for reasons heretofore shown. But had she actually made said deed the same would have been void because made within said five years, a fact thus admitted by the pleadings. Said decisions were therefore erroneous under this second proposition and the same should be reversed and remanded to said state courts for correction.

That said W. B. Adkins had no right or interest in said lands is settled by the decisions of said court in the cases of *Degraffenreid* v. *Iowa Land and Trust Company*, 20 Okla. 687, and *Irving* v. *Diamond*, 23 Okla. 325, in each of which cases the estate of a deceased child was involved, who left both

father and mother living at the time of its death and where the Creek laws of descent and distribution governed the descent and devolution of their lands; and in each case the mother was held to be the nearest relation and took said lands, as the heir, to the exclusion of the father.

THIRD PROPOSITION:

That said deed was absolutely null and void for the further reason that the same was not made or executed in the way and manner provided for in chapter 27 of the Statutes of Arkansas of 1884, and especially as therein provided for in sections 648 and 659, which said chapter was put in force under an Act of Congress approved on the 19th day of February, 1903, the legal effect and consequence of which was discussed and considered in the opinion of said Supreme Court and by which the plaintiff in error was denied her right, title and interest in said lands.

The deed is absolutely null and void because the same was not made and executed by the plaintiff in error in the way and manner provided for in said chapter 27, and especially sections 648 and 659 thereof. On the trial of this case, the plaintiff in error also pointed out and insisted upon the full protection of said Act of Congress putting in force said chapter 27 of said Statutes of Arkansas, on the 19th

of Feruary, 1903. The case was considered by said Supreme Court in connection with this Act of Congress as shown upon the face of the opinion rendered by said court in the case at bar and shown on pages 54 to 62, inclusive; and by said decision the plaintiff in error was denied the benefit and protection of said act and the same was thereby construed against her and therein held that said sections 648 and 659 had no application to the case at bar; that under said deed, though not properly acknowledged for recordation, passed the fee simple title to said lands from plaintiff in error to said Jake F. Arnold. From the opinion delivered in this case by the said Supreme Court, it will be observed that said court based its entire decision simply on the conclusion that said deed, notwithstanding its form and the allegation that it was thereby intended to pass on the relinquishment of dower, actually did pass the fee simple title to the lands; and to reach that conclusion it was there held that said section 648 and 659 had no application to said deed and was not in full force and effect in Indian Territory at the time the same was made. To substantiate this view of the case a number of decisions of the Supreme Court of Arkansas were cited as authority, and the further fact pointed out that by section 31 of an Act of Congress passed on the 2nd of May, 1890, therein designated as the first paragraph of article 104, married women were permitted to sell and dispose of their separate real estate as a *femme sole*.

In delivering the opinion in this case, said Supreme Court observed:

> "To properly determine the questions arising in this case it is necessary to inquire into and determine the state of the law, in Indian Territory, prior to statehood, relative to the conveyance of real property, and especially of the real property of married women. It is contended in this case that the Statute of Arkansas, requiring the husband to join the deed conveying the wife's land, was in full force, unmodified, as found in section 659 of article 27 of Mansfield's Digest; and that being so in force, that a certain line of decisions of the Supreme Court of that state was brought over with it, and became binding on the courts of Indian Territory. This line of decisions announced perhaps, the most rigid rules, regarding the mode and acknowledgment of conveyances, of the states, with perhaps the exception of Virginia and West Virginia. In these decisions a strict and literal compliance with the prescribed forms, and even the use of statutory words, was required to pass title. After the adoption of the Arkansas Constitution in 1874, these rigid rules of construction were in large measure relaxed, and many of the earlier cases overruled or the principles announced in them abandoned, and a new rule of decision became the settled law. To determine which of these lines of decisions should guide the court, it will be necessary to go somewhat at length into this matter. Sec. 659, Art. 27, M. D., which requires the husband to join in the execution of a married woman's deed to her lands, is a provision found in the first statutes of that state. Sec. 10, chap.

31, Stat. 1836; it was continued in all subsequent statutes and in Sec. 849, Gantt's Digest 1874. In the Constitution of 1868 Arkansas enlarged the rights of married women and gave them in Sec. 6, Art. 12, the right to devise or bequeath their real estate the same as though a *femme sole*. In the Constitution of 1874, the rights of married women were still further enlarged, and Sec. 7, Art. 9, thereof gave them the right not only to devise or bequeath, but also to convey their real estate the same as through a *femme sole*. After the adoption of this constitutional provision, the legislature adopted it (Sec. 7, Art. 9), in *haec verba*, as a law, Meh. 8th, 1883, and it is Sec. 4621, Art. 104, M. D. (Ark.). This was the state of the law of Arkansas when its statutes (Mansfield's Digest) were compiled in 1884, and while the ancient provision of the law, requiring the joining of the husband in a married woman's deed was incorporated in that compilation, as Sec. 659, Art. 27, yet it had been modified, so as not to require such joining of the husband in the conveyance of the wife's land by both the sections of the Constitution of 1874, *supra*, and by the later Act (Sec. 4621) of the Legislature; and therefore, although incorporated, without modification in Mansfield's Digest, it was not the law of that state, after the adoption of the Constitution of 1874. And was therefore not a law of Arkansas at the close of the Legislative Session of 1883. An unbroken line of decisions of the Supreme Court of Arkansas hold that after the adoption of the Constitution of 1874 this section in so far as it required husbands to join in their wife's deed to her lands, was not in force, as to lands acquired, or where the marital

relations began, after the adoption of the Constitution. *Roberts* v. *Wilcockson*, 36 Ark. 355; *Holt* v. *Moore*, 37 Ark. 148; *Donahue* v. *Mills*, 41 Ark. 421; *Bryan* v. *Winburn*, 43 Ark. 28; *Crisco* v. *Hambrick*, 47 Ark. 325.

On May 2nd, 1890, Congress passed an act to enlarge the jurisdiction of the United States Courts in the Indian Territory, and for other purposes (chapter 182, 26 U. S. Stat., page 94). Section 31 of this act provided:

> 'That certain general laws of the State of Arkansas in force at the close of the session of the general assembly of that state of eighteen hundred and eighty-three, as published in eighteen hundred and eighty-four in the volume known as "Mansfield's Digest" of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this act, etc., * * * are hereby extended over and put in force in the Indian Territory, until Congress shall otherwise provide, that is to say, the provisions of the said general Statutes of Arkansas relating * * * to married women, chapter one hundred and four.'

The first paragraph of article 104 as thus put in force is:

> '*Section 4621.* The real and personal property of any *femme covert* in this state, acquired either before or after marriage, whether by gift, grant, inheritance, devise or otherwise, shall, so long as she may choose, be and remain her separate estate and property, and may be devised, bequeathed or conveyed by her the same as if

she were a *femme sole;* and the same shall not be subject to the debts of her husband.'

That a married woman could convey her real estate under this provision, as though she were single, is not disputed up to 1903, when Congress passed another act (32 U. S. Stat. L. page 841) putting in force in Indian Territory chapter 27, Mansfield's Digest. The adopting words are:

'That chapter 27 of the Digest of the Statutes of Arkansas known as Mansfield's Digest of eighteen hundred and eighty-four, is hereby extended to the Indian Territory, so far as the same may be applicable and not inconsistent with any law of Congress, etc.'

In chapter 27, *supra*, are the following sections:

'*Sec. 648.* A married woman may convey her real estate or any part thereof by deed of conveyance, executed by herself and her husband and acknowledged and certified in the manner hereinafter prescribed.'

'*Sec. 659.* The conveyance of any real estate by any married woman, or the relinquishment of dower in any of her husband's real estate, shall be authenticated and the title passed, by such married woman voluntarily appearing before the proper court or officer, and in the absence of her husband declaring that she had of her own free will executed the deed or instrument in question, or that she had signed the relinquishment of dower for the pur-

pose therein contained, and set forth without compulsion or undue influence of her husband'."

Thus the court will observe that said Supreme Court recognized, discussed and directly passed upon the force and effect of the Act of Congress which put said chapter 27 of the Digest of the Statutes of Arkansas of 1884, and sections 648 and 659 thereof, and construed said chapter against the plaintiff in error and denied to her her rights and interests in said lands under said act; and it is there pointed out that said chapter was enacted by the Legislature of Arkansas prior to the adoption of the new constitution of that state passed in 1874. This opinion also sets forth that:

"In the Constitution of 1874, the rights of married women were still further enlarged, and Sec. 7, Art. 9, thereof gave them the right not only to devise or bequeath, but also to convey their real estate the same as though a *femme sole*. After the adoption of this constitutional provision, the legislature adopted it (Sec. 7, Art. 9), in *haec verba*, as a law, Mch. 8th, 1883, and it is Sec. 4621, Art. 104 M. D. (Ark.). This was the state of the law of Arkansas when its statutes (Mansfield's Digest) were compiled in 1884, and while the ancient provision of the law, requiring the joining of the husband in a married woman's deed was incorporated in that compilation, as Sec. 659, Art. 27, yet it had been modified, so as not to require such joining of the husband in the conveyance of the wife's land by both the section of the Constitution of

> 1874, *supra*, and by the later Act (Sec. 4621) of the legislature; and therefore, although incorporated, without modification in Mansfield's Digest, it was not the law of that state, after the adoption of the Constitution of 1874. And was therefore not a law of Arkansas at the close of the Legislative Session of 1883."

Here is an open recognition of the fact that chapter 27 was in full force and effect in the State of Arkansas prior to the adoption of the Constitution of that state in 1874; and that under this new constitution the law was so changed that a married woman could sell and dispose of her property as a *femme sole*. It is also pointed out that chapter 27 is incorporated in, and a part of, the volume known and designated as Mansfield's Digest of the Statutes of Arkansas of 1884; but it is there insisted upon that this chapter was not a law of Arkansas at the close of the Legislative Session of 1883, but that these provisions of the new Constitution set forth in section 4621, Art. 104, M. D., was the law at that time. This may have been true, but still this furnishes no reason whatever for so holding and deciding that sections 648 and 659 of chapter 27 had no application in Indian Territory or to the case at bar. In said opinion it is said:

> "The adopting words are: That chapter 27 of the Digest of the Statutes of Arkansas known as Mansfield's Digest of eighteen hundred and eighty-four, is hereby extended to the Indian Territory, so far as the same may be

applicable and not inconsistent with any law of Congress, etc."

Thus chapter 27 being thus incorporated in said Digest of the Statutes of Arkansas of 1884, it is wholly immaterial whether that chapter properly belonged to that digest or not, and whether said chapter was, when so adopted on the 19th of February, 1903, a law in the State of Arkansas or not. Chapter 27 in its full text is shown in this compilation of Arkansas Statutes of 1884, and the same comes in its regular order and extends from page 275 to 282, inclusive, of said volume; and this chapter is styled "Conveyances of Real Estate." This opinion recognizes that said chapter was actually put in force in the Indian Territory under this Act of Congress; for it also holds that the acknowledgment of the deed in the case at bar was not acknowledged in the way and manner required by this chapter, and, therefore, the same was not entitled to be recorded. But they hold that the deed was valid and sufficient to pass the title to the fee, without any acknowledgment. But at the same time said court held that sections 648 and 659 of said chapter were inapplicable and were not intended to be put in force in Indian Territory by said Act of Congress, and relied upon the new Constitution of Arkansas and section 4621 of chapter 104 of this Digest of 1884 as the exclusive authority governing the sale and transfer of the separate real estate of married

women in Indian Territory prior to statehood. It is competent for Congress to thus adopt chapter 27 of the Statutes of Arkansas of 1884, whether said chapter was then in force in Arkansas or not, and no one has a right to dispute it, as it was a matter solely with Congress. Congress never did adopt, or put in force in the Indian Territory, this new Constitution of Arkansas of 1874. Hence, it never had any force or effect in the Indian Territory. But Congress did, by an act approved May 2, 1890, extend quite a number of chapters of the Statutes of Arkansas of 1884 over Indian Territory, among which is chapter 104, which embraced said section 4621, cited in said opinion. But it is noticeable that chapter 27 was not in the list of chapters then put in force by said act in said territory. It is also noticeable that, in thus adopting said chapters or general laws of Arkansas, as shown by section 31 of said act, Congress distinctly provided:

> "That certain general laws of the State of Arkansas in force at the close of the session of the general assembly of that state of eighteen hundred and eighty-three, as published in eighteen hundred and eighty-four in the volume known as Mansfield's Digest of the Statutes of Arkansas, *which are not locally inapplicable or in conflict with this act or with any law of Congress*, relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory *until Congress shall otherwise provide*, etc." (Italics are mine.)

But, at the close of this section, it is also specifically provided that:

> "But nothing in this act shall be so construed as to deprive any of the courts of the civilized nations of exclusive jurisdiction over all cases arising wherein members of said nations, whether by treaty, blood or adoption, are the sole parties, nor so as to interfere with the right and power of said civilized nations to punish said members for violation of the statutes and laws enacted by their national councils where such laws are not contrary to the treaties and laws of the United States."

And in section 6 of an Act of Congress, entitled, "An Act to Establish a United States Court in the Indian Territory, and for Other Purposes," approved March 1st, 1899, as to the jurisdiction of said court, it provides:

> "That nothing herein contained shall be so construed as to give the court jurisdiction over controversies between persons of Indian blood only;"

and section 30 of said Act of May 2nd, 1890, also provides:

> "That the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation, by nativity or by adoption, shall be the only parties; and as to all such cases the laws of the State of Arkansas extended over and put in force in said Indian Territory by this act shall not apply;"

and in recognition of this provision we refer to the following decisions of this court: *Ex parte Mayfield*, 141 U. S. 107, 35 L. ed. 635; *Alberty* v. *United States*, 162 U. S. 500, 40 L. ed. 1051; *Talton* v. *Mayes*, 163 U. S. 337, 41 L. ed. 196; *Lucas* v. *United States*, 163 U. S. 613, 41 L. ed. 282; *Nofire* v. *United States*, 164 U. S. 657, 41 L. ed. 588; and *Stephens* v. *Cherokee Nation*, 174 U. S. 483, 43 L. ed. 1041.

Other exceptions are manifest in said act among which is section 38 thereof relating to the domestic affairs among said Five Civilized Tribes; and which exception or special provision thus made was recognized by the Supreme Court of said state in its decision in the case of *Oklahoma Land Company et al.* v. *Thomas et al.*, 34 Okla. 690, where this matter is specially referred to. Thus, by this exception in said section 31 it appears that the adoption of these laws of Arkansas had no application whatever to members of the Five Civilized Tribes so as to in any manner "deprive any of the courts of the civilized nations of exclusive jurisdiction over all cases arising wherein members of said nations, whether by treaty, blood or adoption, are the sole parties, or so as to interfere with the right and powers of said civilized nations to punish said members for violation of the statute and laws enacted by their national council where such laws are not contrary to the treaties and laws of the United States." Thus, it would seem that, under this Act of May 2, 1890,

said statutes had no application whatever to the Five Civilized Tribes or their members in civil and criminal matters, except where one party to the controversy was not a member of said tribes. It is a well known fact that the Creek Nation had a system of laws of its own comprising the legislative, executory and judicial departments, and enacted laws by which their members were protected and their rights enforced through these departments. They were permitted to own and dispose of property (that is personal property, as the lands of the Creek Nation did not, at the time said act was passed, belong in fee to any of its members). These Creek laws are embraced in the compilations of Perryman and McKellop known as "Constitution and Laws of the Muskogee Nation 1893." From this express provision of said Act of Congress of May 2, 1890, it will appear that said statutes thus adopted were not intended to apply to the members of said tribe and the disposition of their property, or to deprive their courts of the exclusive jurisdiction over said matters and their rights thereto pertaining to be enforced according to their own laws, as therein provided. It would therefore follow, that the provisions of said section 4621 of chapter 104 thus spread over Indian Territory could have no application whatever to sales and conveyances by these married Indian women, whether by treaty, blood or adoption, for two reasons: *first*, because at the time said act was adopted the members of said Five

Civilized Tribes, whether male or female, married or single, had no real estate in Indian Territory, and of their respective domains; nor was there any law at that time by which said members had, or could possibly acquire, any interest, right or title individually and severally in or to any of the lands of the domain of said respective tribes, *Cherokee Nation* v. *Journeycake*, 155 U. S. 196, 39 L. ed. 120; *Stephens* v. *Cherokee Nation*, 174 U. S. 483, 43 L. ed. 1041; *Delaware Indians* v. *Cherokee Nation*, 193 U. S. 136, 48 L. ed. 880, 886; but such were public lands, *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Delaware Indians* v. *Cherokee Nation*, 193 U. S. 136; *Wallace* v. *Adams*, 143 Fed. 716; same, 204 U. S. 415; *Ligon* v. *Johnson*, 164 Fed. 670; and were subject to the plenary powers of Congress, *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 308, 47 L. ed. 183, 190; *United States* v. *Rickert*, 188 U. S. 432, 47 L. ed. 532; *McKay* v. *Kalyton*, 204 U. S. 458, 51 L. ed. 566; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 47 L. ed. 299, and *Marchie Tiger* v. *Western Investment Co.*, 221 U. S. 286, 55 Law ed. 748; and that the title to the tribes themselves was only a base or qualified fee, *United States* v. *Reese*, 5 Dill. 405, and *Fleming* v. *McCurtain*, 215 U. S. 438, 54 L. ed. 88, in which last case it is held that "the grant being to the nation only, is limited in point of time to the corporate existence of the nation;" and, *second*, because of this express provision found in said section 31 of said act above referred to.

It, therefore, follows that said respective statutes thus adopted by said act were "*locally inapplicable*" to the sale and conveyance of married women's real estate in Indian Territory; and that to apply said statutes to the members of said tribes and their property was, and would be, "*in conflict with this act*"; and would likewise be in conflict with "any law of Congress"; for, by the various Acts of Congress made prior to that time, said tribes and their members had no power or authority to make any disposition whatever of the lands or domain of their respective tribes; among which acts were the Acts of Congress, as to said Creek Nation, of May 9, 1832, and the 14th of February, 1833, by reason of which said grant was made to said Creek Nation on the 11th of August, 1852; and said Act of the 14th of June, 1866, ratified July 19, 1866, and proclaimed August 11, 1866, whereby extensive provisions were made for the government of said Creek Nation, its legislative powers were defined, and provisions made for the control of such matters by Congress.

It would therefore appear from the very expressed provision in the act itself of May 2, 1890, that Congress never intended these adopted Statutes of Arkansas to govern the members of the Five Civilized Tribes or their property, or that said section 4621, of said chapter 104, should ever be applied to the sale and conveyance of married women's separate real estate who were members of

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said tribes and whose estates were situated in the Indian Territory. This notion is further advanced by the fact that Congress permitted the laws and courts of said respective tribes to remain in full force and effect, until the 28th of June, 1898, at which time Congress passed what is known as the Curtis Bill. In section 26 of this act, it is thus provided:

> "That on and after the passage of this act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of United States in Indian Territory;"

and by section 28 thereof, it further provides:

> "That on the first day of July, eighteen hundred and ninety-eight, all tribal courts in Indian Territory shall be abolished * * * *provided*, that this section shall not be in force as to the Chickasaw, Choctaw and Creek Tribes or nations until the first day of October, eighteen hundred and ninety-eight,"

the validity of which act was established by this court in *Stephens v. Cherokee Nation*, 174 U. S. 483, 43 L. ed. 1041, point 5, as follows:

> "The Acts of Congress in respect to the determination of citizenship in Indian tribes are not unconstitutional as impairing or destroying vested rights, as the lands and money of these tribes are public, and are not held in individual ownership."

This Act of May 2, 1890, in effect, further provides in said section 31 that said adopted statutes

"*are hereby extended over and put in force in the Indian Territory until Congress shall otherwise provide.*" It therefore follows as conclusive that as soon as "*Congress shall otherwise provide,*" then said statutes, or such of them or parts of them as would be in conflict with such subsequent Acts of Congress, would no longer have any force or effect; but such subsequent Acts of Congress, whether repealing said statutes expressly or by implication, would become the law which governed the subject matter of such acts. And such subsequent acts may apply to the whole Five Civilized Tribes, or may apply to any one of such tribes; and still the same would repeal conflicting provisions of said statutes thus put in force under said Act of May 2, 1890. In the case at bar, it is unnecessary to consider any but said Creek Nation, as this is the tribe or nation whose lands and member of whose tribe is concerned in this case. On the first of March, 1901, Congress approved this Original Creek Agreement and the same became effectual as a law on the 25th of May, 1901, when said act was ratified. By this act elaborate provisions were made for the allotment of the domain of the Creek Nation and under which provisions and subsequent Acts of Congress such allotments were made. Under this act Creek members acquired the title in fee simple to their respective allotments where they received them in their lifetime. This is the first Act of Congress under which a member of the Creek tribe could ac-

quire the fee to his allotment or to any part of the domain of the said Creek Nation; it being held by said Supreme Court of said state in *Barnett* v. *Way*, 29 Okla. 780, 119 Pac. 418, and other cases, and by the District Court of Eastern Oklahoma in *Reed* v. *Welty*, 197 Fed. 419, that the Curtis Act passed no right to the fee to allotments taken under said act. By the provisions of said Original Creek Agreement and the Supplemental Creek Agreement, and particularly sections 7 and 16 thereof, as hereinbefore pointed out, said allotments in said Creek Nation were restricted and inalienable by the allottee or his heirs, for a period of five years, from the ratification of said agreements. This Supplement Agreement was proclaimed and became a law on the 8th of August, 1902. Consequently, such Creek members could not dispose of their allotments at any time prior to the 8th of August, 1907; and that, too, regardless of whether they were male or female, married or single. So that the alienation of allotments made to said Creek members and so received in their lifetime could not be sold under said acts at any time prior to the 8th of August, 1907; and this applied to all alike and included the allotments of such married women who were members of said tribe, whether by treaty, blood or adoption, *Franklin* v. *Lynch and O. A. Simmons*, 58 L. ed. 505, decided by this court April 6, 1914, and cases there cited. It is apparent therefore that the terms and provisions of said Original Creek Agreement and said

Supplemental Creek Agreement were antagonistic to said section 4621 of said chapter 104 of the Statutes of Arkansas, which provides that a married woman may convey her separate real estate as a *femme sole;* for said Acts of Congress thus forbid such married women from selling their separate real estate at all, within the five years' restrictions. Before that five years expired, Congress, on the 19th of February, 1903, put said chapter 27 in force throughout Indian Territory. This chapter provides the way and manner in which conveyances of real estate could be made and the deeds recorded; and section 648 thereof requires that the husband join in the wife's deed for her separate real property, and section 659 provides that the wife must be examined privily and apart from her husband, and prescribed the exact way and manner in which these facts had to appear in the certificate of acknowledgment. And the court will observe that this section specifically provides that where she is conveying her own separate real estate, it is required that such conveyance "shall be authenticated and the title passed, by such married woman voluntarily appearing before the proper court or officer, and in the absence of her husband declaring that she had of her own free will executed the deed or instrument in question;" but if she was simply relinquishing her dower in "her husband's real estate," then she should declare to such court or officer "that she had signed the relinquishment of dower for the pur-

poses therein contained, and set forth without compulsion or undue influence of her husband." These specific requirements had to be shown substantially in the certificate of such acknowledgment by said court or officer; and until this was done the title to her lands did not pass, as thus shown in the express provisions of said section 659. It therefore followed that sections 648 and 659 operated within themselves as a restriction on the alienation of such married women's real estate, until their provisions were substantially complied with. The passage of this act February 19, 1903, did not displace or remove the restrictions on the alienation of such lands, imposed by said Original and Supplemental Creek Agreements, as so held by this court in *Franklin* v. *Lynch* above cited.

The notion that chapter 104 of the Statutes of Arkansas, and likewise said other statutes, had no application to said members or their property, is further corroborated by the fact that on the 28th of April, 1904, Congress passed another act whereby all such Statutes of Arkansas theretofore put in force in Indian Territory were extended in their operation, "*so as to embrace all persons and estates in said territory, whether Indian, freedman or otherwise.*" If, as insisted upon by said state Supreme Court in its opinion in the case at bar, said statutes put in force under said Act of May 2, 1890, were applicable alike to the members of said tribes and

likewise to other people then living in said territory and which outnumbered said Indians, what use, excuse or importance could be attached to this Act of Congress of April 28, 1904, wherein the same expressly provides that said Statutes of Arkansas shall apply to all persons and estates, whether Indians, freedman or otherwise? To say that this express provision added nothing to the law as it existed prior to that time, is simply to impute to Congress a vain, useless and frivolous act, which is never to be thus imputed to Congress. As before stated, section 31 of said Act of May 2, 1890, in effect *excluded* the members of said tribes and their property; but this Act of April 28, 1904, expressly *includes* them and their property as well as all other persons and estates in said territory. Not only this but the same laws and statutes that Congress had put in force in one tribe by these recent treaties did not exist in other tribes or at least all of such tribes; and it is evident that it was the purpose of Congress, by this Act of April 28, 1904, to make the laws uniform and the same in each and all of said tribes and equally applicable to all persons whomsoever and their estates, then living and residing in said territory. All of this of course was made subject to the restrictions imposed by Congress in these several recent treaties with these tribes. So that when members of said tribes sought to convey their allotments, after the 28th of April, 1904, they had to comply with the terms of said treaties as to

the restrictions on the alienation thereof the same as before that date; and as to the way and manner in which such conveyances were to be made, that was governed by the specific provisions and terms of said chapter 27 thus put in force in February, 1903; and if such grantor was a married woman her deed had to be joined in by her husband as required by said section 648, and she be examined privily and apart from her husband, as provided in section 659.

In the opinion of said Supreme Court the cases of *Roberts* v. *Wilcockson*, 36 Ark. 355; *Holt* v. *Moore*, 37 Ark. 148; *Donahue* v. *Mills*, 41 Ark. 421; *Bryan* v. *Winburn*, 43 Ark. 28; *Crisco* v. *Hambrick*, 47 Ark. 325, and others are cited to support the opinion of said state courts to the effect that the deed of a married woman for her separate real estate did not have to be acknowledged, etc., as provided in said chapter 27. But the court will take notice that each and every one of these decisions thus cited arose after 1874 and under the provisions of the new Constitution and under chapter 104 of Arkansas, and have no application whatever to chapter 27. After the people of Arkansas had by their new Constitution in 1874 changed their organic laws from what they were prior to that time, and contrary to such prior laws, expressly provided that a married woman could dispose of her real estate the same as a *femme sole*, then, of course, the decisions of the Supreme Court of Arkansas thereafter and

in passing upon the new Constitution, were forced to decide said cases to the very reverse of what they had previously held under said chapter 27; and they did so hold. But that has nothing whatever to do with the true construction of chapter 27 which Congress put in force in Indian Territory on the 19th of February, 1903. This act in putting said chapter in force also prescribes "*so far as the same may be applicable and not inconsistent with any law of Congress, etc.*" That the same was applicable to the conditions of Indian Territory subject to the restrictions of said Acts of Congress I presume cannot be doubted. Then was the act "*inconsistent with any law of Congress*"?

On this point said Supreme Court in its opinion in this case observed: "This chapter 27 was brought over and put in force, 'so far as the same may be applicable and not inconsistent with any law of Congress,' etc.

"It was inconsistent with regard to the matters discussed. It either repealed, by implication the prior law, or it was intended to be brought over in so far as it harmonized with the prior laws. We believe the latter to have been the intention of Congress, and that sections 648 and 659 were brought over so modified as not to affect the conveyance by a married woman of her lands. To hold otherwise would overturn a rule of conveyancing in force for years; would destroy titles and result in disastrous

confusion. This being true, the decisions of the Supreme Court of Arkansas, construing these identical laws, both in the statutes at the same time in conflict, and rendered by that court prior to the date of their adoption here, should furnish a guide and the rules under which the deed in this controversy must be measured and tested."

It is also noticed by said Supreme Court "that the chapter 104 relating to married women was incorporated in the compilation of laws in general use, in Indian Territory Statutes (1899) and chapter 27 was not in that compilation. We think that it is beyond dispute that the bar of Indian Territory, almost unanimously held and advised clients, when a married woman could convey her lands, under the married woman's act, the same as if she were single."

In respect to this last quotation, we observe that there is nothing inconsistent in our theory, nor is there anything in support of the opposite theory, simply because chapter 27 was not incorporated in the compilation of laws in general use in the Indian Territory Statutes; for said statutes were compiled in 1899, and chapter 27 was not put in force in Indian Territory until February, 1903. Consequently, it could not have been incorporated in this compilation. There is nothing in the record in this case to show, even in the slightest degree, "that it is beyond dispute that the bar of Indian Territory, al

most unanimously held, and advised clients, that a married woman could convey her lands, under the married woman's act, the same as if she were single." And we respectfully submit that this statement is simply voluntary and should be given but little consideration. That court also observed that chapter 27 "either repealed by implication the prior law, or it was intended to be brought over in so far as it harmonized with the prior laws. We believe the latter to have been the intention of Congress, and that sections 648 and 659 were brought over so modified as not to affect the conveyance by a married woman of her lands. To hold otherwise would overturn a rule of conveyancing in force for years; would destroy titles and result in disastrous confusion." Thus said Supreme Court seems to have considered more the result of a correct decision of the true construction of chapter 27 than to the construction itself.

To such a position it might not be out of place to cite the observations of Justice STORY as quoted by Justice HARLAN in *United States* v. *Choctaw Nation*, 179 U. S. 496, 45 L. ed. 291, as follows:

> "In the first place, this court does not possess any treaty-making power. That power belongs by the Constitution to another department of the government, and to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial, would be, on our part, an usurpation of power, and not an exercise of judicial functions. It

would be, to make, and not to construe, a treaty. Neither can this court supply a *casus omissus* in a treaty any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter, and having found that, our duty is to follow it as far as it goes and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind. * * * In the next place, this court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the medial parts of the treaty, equally give the rules to judicial tribunals."

These Statutes of Arkansas when thus spread over Indian Territory became Acts of Congress itself; and under its plenary powers it is now indisputable that Congress had the power and authority to pass these acts, *Lone Wolf* v. *Hitchcock*, 187 U. S. 556, 47 L. ed. 299, and *Tiger* v. *Western Inv. Company*, 221 U. S. 286. There is no disputing the fact that sections 648 and 659 of said chapter 27 are so repugnant and antagonistic to section 4621 or the

first section under said chapter 104, respecting the sale and conveyance of married women's separate real estate, that said chapters and especially said respective sections cannot stand together or be construed together, as to such married women's estates who were members of said tribes in Indian Territory, if both applied to the same thing. Even if we should admit that said section 4621 ever applied to such estates, then the same would be repealed by implication by said Act of February 19, 1903, *District of Columbia* v. *Hutton*, 143 U. S. 18, 36 L. ed. 60, and cases there cited. But we insist that said section 4621 never had any application to any of such estates; for there were no such estates on which the same could operate when said sections and chapters were put in force by said Act in May, 1890. Consequently there was no repugnancy between said sections; nor was said Act of Congress of February 19, 1903, inconsistent, in any particular, with said Act of May 2, 1890; but that said chapter 27 thus put in force by said Act of February, 1903, was the sole and only Act of Congress extending such provisions over Indian Territory, and that prior to that time there was no Statute of Arkansas or otherwise put in force in said Territory, providing for conveyances of real estate.

In its opinion, said Supreme Court further observed:

> "Congress, early in its enactment of general laws to govern Indian Territory, seems to

> have caught the spirit of the times, and struck from married women the shackles of the common law limitations and restrictions. Most of the states of this Union from which the Congress is gathered, have enlarged the rights and legal status of married women; and it would seem strange that the Congress, after having accorded these rights and permitting them to continue, and a rule of conveyance and of property to arise, during a period of more than twelve years, should intend to suddenly reverse its policy, and place the married women of Indian Territory again under common law disabilities. And this, too, when the states from which the congressmen come, are yearly traveling farther in the opposite direction."

No citation of authority whatever is given by that learned court for this radical statement; and in my judgment the same will be most difficult to sustain by the Acts of Congress applicable to Indian Territory, and especially that statement where it is observed that "Congress, early in its enactment of general laws to govern Indian Territory, seems to have caught the spirit of the times, and struck from married women the shackles of the common law limitations, and restrictions." Among the statutes put in force in Indian Territory on the 2nd of May, 1890, was Chapter 20 of the Statutes of Arkansas, which related to the common law of England and whereby the common law, as so defined in said chapter, was extended over Indian Territory, and ever thereafter remained. There is no specific

Act of Congress pointed out whereby they "struck from married women the shackles of the common law limitations and restrictions;" and we have but to examine the Acts of Congress relative to the allotment of the several tribes and the future preservation and alienation of such allotment, to observe at a glance that Congress forged shackles not only on married women but likewise upon married men, and also single men and women, to whom such allotments were made, in addition to the common law disability of married women. As soon as Congress passed laws in the form of these modern treaties to said tribes, whereby they were to receive their allotments in fee, it provided not only rigid restrictions against the alienation of said allotments by said allottees and their heirs, but it went still further and provided that violations of such provisions should not only be void, but that no rule of estoppel should ever operate against them. Such provisions may be seen in sections 4, 7 and 23 of this Original Creek Agreement, and in section 16 in said Supplemental Creek Agreement; and in sections 5, 19 and 22 of the Act of April 26, 1906, and sections 1, 6 and 9 of the Act of May 27, 1908, whereby the alienations of such allotments are prohibited, some for a period of five years, some during minority as in said sections 4 and 6, some for twenty-five years, as provided in section 19 of the Act of April 26, 1906, and section 1 of the Act of May 27, 1908, and others until their deeds of conveyance were approved by

the Secretary of the Interior, as in said section 22, or by the county courts having jurisdiction of the settlement of estates of deceased allottees, as provided in section 9 of said Act of May 27, 1908. Thus it would seem that, in the passage of these acts, Congress had not caught the spirit of the times on free and unlimited alienation of these allotments; but, on the contrary, it had evidently observed the danger of exposing the alienation of these allotments to a free and easy mode of disposition, and by these acts, as was its duty and authority, riveted down the allotments for these prescribed periods for the exclusive use and benefit of these indolent and defenseless people. As a further defense and protection to these married women thus receiving allotments, either in their own right or by inheritance, Congress further threw around them the safeguards provided in said chapter 27, by which not only the alienation thereof, but the express mode or manner of alienation was specifically provided for in sections 648 and 659 of said chapter. Can it be said with any reasonable degree of plausibility that after Congress had thus provided for the allotment in fee of the lands of Indian Territory to the members of these tribes and thereby carefully safeguarded the alienation of the same by the numerous provisions of restrictions provided for in these several treaties and subsequent Acts of Congress, that all at once Congress concluded to make the alienation of such allotments so easy and informal that such

married women could thus dispose of the same in the simplest manner possible? It is an old and perhaps universal rule in the construction of statutes that the same must be construed as a whole, and according to the plain intent and purpose of the legislature as indicated by the plain and ordinary language thus used; and where statutes form a system relating to the same object or subject matter, it is competent and proper to examine all statutes *pari materia*, and construe the statutes together. Following these rules and considering these restrictions, it seems to me conclusive that when Congress had begun to allot these lands in fee simple, even though it had thus restricted their alienation as provided in these acts, Congress further saw the need of prescribing a mode of conveyance and thereby put in force chapter 27 of Arkansas, which, as above stated, further safeguarded and protected the rights and interests of such married women in the lands they were thus to receive. This case has proven the great necessity for such protection. The fact that avaricious persons have taken their chances in getting hold of the lands of a married woman, without having complied with this law, whereby they could legally convey the same, is no reason whatever why the courts of the land should ignore the protection which Congress thus intended for the benefit and safeguard of this unfortunate and illiterate class of people thus provided for, in order to protect and enrich that very class of people

against whose cunning and avaricious disposition in the acquisition of these lands these Acts of Congress were intended to be a safeguard. It was the Indian, and not these unscrupulous grafters, who was intended to be protected by these Acts of Congress; and it is to the Indian alone and his interest to whom the court should look in the enforcement of such act, regardless of what evil consequences might thus happen to these intruders. We cannot agree that it would be disastrous to give back to the Indian that which he is justly entitled under these laws, rather than to let those who have transgressed the law keep their ill-gotten gains, to which they are not entitled under the law. Nor do we concede that "Congress, after having accorded these rights and permitted them to continue, and a rule of conveyance and of property to arise, during a period of more than twelve years, should intend to suddenly reverse its policy, and place the married women of Indian Territory again under common law disabilities." Congress was continuously passing these acts for the protection of the Indians and did not permit anything whereby its laws were violated. These violations took place against, and not by permission of, these Acts of Congress, and for which Congress is in nowise responsible. The first law passed by which a Creek citizen could obtain his allotment, as heretofore stated, was this Original Creek Agreement which took effect and became a law on the 25th day of May, 1901. This was more

then eleven years after Congress passed the Act of May 2nd, 1890, and under which, or at least chapter 104, thus put in force, it is now claimed that married women ever after the passage of said act, could sell and dispose of their real property as a *femme sole*. Such contention cannot be maintained; for during that eleven years such married women had no lands to alienate. But in a little over a year and a half after this Original Creek Agreement became a law and by which married women for the first time acquired separate real estate in said Creek Nation in the form of allotments, Congress passed this Act of February 19, 1903, which was evidently intended to safeguard her estate even after such restrictions might become removed. Prior to these allotments among the members of these tribes, there was no necessity for Congress to pass said chapter 27 as to these allotments, for no such allotments existed to which the same could have any application. This was also true as to chapter 104; and for that reason it was a legal impossibility for said chapter 104 to have any application whatever to such allotments at the time said Act of May 2nd, 1890, was passed. If it had no legal application to such allotments when thus passed, it could, of course, have no application at any time thereafter unless some other Act of Congress would provide for such application. But instead of Congress, after such allotments were made, providing for the application thereto of said chapter 104, it expressly provided

for the adoption of said chapter 27 and without any limitation whatever upon any part of this chapter being thus operative. Consequently the entire text and all the provisions of said chapter 27 became fully operative as the law on conveyances of such real estate from and after the 19th of February, 1903.

Said Supreme Court then takes up the consideration of the deed in controversy in this case, and states that "it stands admitted that on the date of the execution of the deed by defendant to Jake F. Arnold, to the lands conveyed in his mortgage to Henry C. Arnold, that defendant, Martha Adkins, was the owner of the lands as her separate estate, in her own right. A construction of this deed is necessary. And if our conclusions are correct on the question of what law was in force in Indian Territory prior to statehood, then this deed will have to be construed by considering its terms in the light of the decisions of Arkansas, rendered after the Constitution of 1874, and prior to 1884."

It then takes up the consideration of subsequent decisions of Arkansas and relies principally upon the decision of *Bryan et al.* v. *Winburn*, 43 Ark. 29, where the land belonged to Mrs. Bell, who joined in the granting clause of her deed, but simply relinquished her dower, and which was held to pass the title to her lands under the provisions of the new constitution, even without a correct acknowl-

edgment. Of course, if the provision of said section 4621 of chapter 104 is to govern this case and all other like cases in the Indian Territory, then such decisions are applicable. But, if chapter 27 is to govern, then such decisions arising under the new constitution and said section have no application whatever to the case at bar or similar cases in said Territory. And in this connection we might here observe, that even if said section 4621 applied to the case at bar, still, the decisions of said state courts were erroneous for the reason, as under the first assignment pointed out, the plaintiff in error alleges that she never made, executed or delivered said deed to said Jake F. Arnold; that she received no consideration for the same, whatever; and that she was then, and ever since said lands had been segregated has been in the possession of said lands, and claimed the same as her own in fee simple. Of course, a deed is inoperative to pass title until delivered, or where there is no consideration and the grantor still holds the possession of the lands and claims them in fee simple. And again, said decision was erroneous because, under said Acts of Congress, said lands were restricted under section 16 of said Supplemental Creek Agreement, at the time of the execution of this deed on the 15th of January, 1907. It is true that said state courts made no reference to these restrictions in their decisions; but they passed upon the same by implication, of necessity. Otherwise, they could not have

held said deed valid. As to the consideration, said Supreme Court observed: "There is no charge of fraud, deceit or inadequacy of price made in this case." This statement is correct as to fraud and deceit; but it is not correct as to "inadequacy of price;" for in her supplemental answer and petition, as shown on pages 31 and 32 of the record, the plaintiff in error shows conclusively and with all the positiveness possible that she never received any consideration whatever for said lands for the execution of said deed, and such allegations were admitted to be true and undisputed by the pleadings in this case.

The opinion of said State Supreme Court then closes, as follows:

> "An examination of this deed shows that Mrs. Adkins, the sole owner of the land, joins in the operative words of grant, usually designated as the granting clause. This clause is carelessly drawn, and uses both the singular and the plural in the designation of parties. It speaks of both 'party of the first part.' Recites the consideration as 'to me paid,' and then, in the actual words of grant, says: 'do hereby bargain, grant, sell and convey.' Mrs. Adkins participates in the 'habendum' clause in the body of the deed following the words of grant. It is true, the covenants of warranty were made by her husband, but the warranties stipulated in this deed were unnecessary to be inserted in it because they were implied by the use of the granting words, 'grant, bargain and sell.' Sec. 639, Mansfield's Digest, Arkansas.

In attempting to arrive at the intention of the parties to this deed, we may take into account the situation of the parties at the time it was executed. This land was part of the allotment made in the name of the deceased infant child of the grantors; at the time it was made it is very probable that neither the grantors nor grantee had a very clear or correct idea as to whether both parents, or if only one, which of them, took title to this land. They did not then have the advantage of the adjudication of this court in regard thereto. And in this situation it seems reasonable, and comports with the idea of fair dealing between the parties, to believe that when the purchaser paid $1500.00 for 80 acres of land he believed, and when the husband and wife signed the deed and received into the family the money that they believed, that a full transfer of all the legal rights they each had in the land was being accomplished, whatever those rights might be. The insertion of the release of dower was probably a matter of precaution, and to make certain of a full title, in the event the courts later, in construing the question of descent, would hold that the child's lands passed to the father. The parties evidently believed that these lands passed to the father, in which event the wife had dower, or to the father and mother in equal rights, or to the mother alone. In any event, it appears clear that in this deed the parties were trying to provide a vehicle so comprehensive in its terms as to surely pass all the title each of the parents of the deceased child had, whatever those rights might later be determined to be.

In the light of the Arkansas decisions, and in reason, we believe that the deed in this case

was sufficient to pass title, as between the parties and their privies, although not acknowledged in such form as to entitle it to registration under the law in force in Indian Territory. The plaintiff in this case was seeking to foreclose a mortgage given by the grantee of Mrs. Adkins, the deed being good between the grantor and grantee it was good as to the mortgagee. No other deed or subsequent conveyances are set up. We therefore believe the answer and cross petition of the defendant did not state a defense, a cause of action, or grounds for relief, as sought, and that the demurrer to same was properly sustained and the judgment of the trial court should therefore be affirmed.

Nov. 18, 1911.—By the court. Adopted in whole."

Thus it may be seen that this conclusion is very largely speculative as to the interests of the father and mother in the lands, their intention to convey the same, and the consideration therein pointed out to be "$1500.00 for this 80 acres of land," and thus held and decided to be the very reverse of the facts and allegations set up in the answers and cross petitions of the plaintiff in error, which were thus taken to be true and fully established on this motion for judgment on the pleadings and these demurrers to said answers and cross petitions, filed by said defendant in error, Henry C. Arnold. We respectfully submit that the court, as well as the parties to a suit, are bound by the pleadings and by the admissions, the facts, and allegations contained

in the pleadings; and that nothing can be supplied, especially in appellate courts, but that the courts should decide such cases according to the record. And where the title to lands is involved under a deed, that the legal force and effect of such deed is to be determined from a true construction of said deed according to its terms and provisions and in accordance with the charges, facts and allegations in the pleadings pertaining thereto. It is true that this deed recites a consideration of "the sum of Fifteen Hundred Dollars to me paid by Jake F. Arnold." It is evident from an inspection of the deed that W. B. Adkins was the real maker of this deed; and that the pronoun "*me*," referred to said Adkins, and not to the plaintiff in error, who joined therein simply relinquishing her dower in said lands, as shown in the body of said deed and likewise in the certificate of the officer who took that acknowledgment. Besides, the plaintiff in error, in her said amended answer, charges emphatically that she did not "at any time or place nor in any way, form or manner whatever, receive, directly or indirectly, any part or portion of the said consideration of fifteen hundred dollars mentioned in said deed, as the consideration for said lands therein described; nor has she the said defendant at any time or place, or in any way, form or manner, either directly or indirectly, received any consideration of any kind, character or description whatever, for the execution of said deed or for the said lands therein

and in said amended answer and cross petition mentioned and described, or by virtue of said deed having been so executed and said lands having been thus attempted — be conveyed by said deed or through its force and effect." This allegation is nowhere denied, and we respectfully submit that said state courts had no right to assume that the purchaser paid fifteen hundred dollars for this 80 acres of land, as so pointed out in this opinion; and we also respectfully submit that said Supreme Court erred in relying upon said decisions of Arkansas, which had been rendered upon said new constitution and after the same had thus taken effect, but that the same are wholly inapplicable to the construction of said deed; and we here point out that said decision of said court in said *Bryan* case thus relied upon is the very reverse of the decisions of said Supreme Court in construing said chapter 27, and especially the cases of *Little* v. *Dodge*, 37 Ark. 453; *Wentworth* v. *Clark*, 33 Ark. 432; *McGehee* v. *McKenzie*, 43 Ark. 156; *Rogers* v. *Brooks*, 30 Ark. 612; *Stidham* v. *Mathews*, 29 Ark. 654, and *Wood* v. *Perry*, 30 Ark. 385.

We therefore contend, and will hereafter show, that the law governing this attempted conveyance on the 15th day of January, 1907, is chapter 27 of the Statutes of Arkansas, put in force in Indian Territory on the 19th day of February, 1903, by an Act of Congress (32 U. S. Stat. L. 841). Section

659 of this chapter, relating to the acknowledgment of married women, alienating either their own lands or the dower interest in their husband's lands, is as follows:

> "The conveyance of any real estate by any married woman, or *the relinquishment of dower in any of her husband's real estate*, shall be authenticated and *the title passed* by such married woman voluntarily appearing before the proper court or officer, and in the absence of her husband declaring that she had of her own free will executed the deed or instrument in question, or that *she had signed the relinquishment of dower* for the purposes therein contained, and set forth without compulsion or undue influence of her husband."

Thus, it will be seen that the language both of the deed in controversy in this suit and that of the acknowledgment thereto attached, wherein they relate or in anywise pertain to the plaintiff in error, has reference to, and affects only, her "relinquishment of dower" to the lands attempted to be conveyed. That acknowledgment is in almost the exact language of the statute above cited, and which is the only means by which a married woman could then alienate her real estate or relinquish her dower in the lands of her husband.

The language of that statute bears the impress of the historic development of hundreds of years, by which, from time to time, a married woman was enabled to alienate her own real estate and her dow-

er interest in her husband's lands. It is common information that a married woman, at common law, could not make a contract enforceable against her; and especially so as to any undertaking to dispose of or convey her real estate. It would seem that by the very early common law, a married woman, by the consent of her husband, could convey her lands by feoffment, and execute a deed as evidence of her alienation; and, by a custom prevalent in London and some other cities, she could convey her lands by deed concurred in by her husband, where she was "separately examined," apart from her husband, by the mayor or some other officer, which custom seems to have been settled during the thirteenth century. But it gradually became the law that the only proper conveyance of a married woman, except where such custom as that of London existed, was a *fine*. Pol. & Mait. Hist. Eng. Law, 2nd. ed. II, pp. 410-413. But later, the wife was made a party to a *common recovery*, by which the same results were achieved; but this method was more often resorted to for the purpose of alienating or relinquishing the wife's dower in her husband's lands. Shepher's Touchtsone, 41; *Earle* v. *Snow*, Plowd. 504, 515. But these methods were abolished, in England, by the Fines and Recoveries Act, in 1833, which authorized the husband and wife to convey her lands by deed acknowledged in the manner prescribed by the Act. Feoffment, however, as a means of conveyance or transfer of realty in England, was not

abolished by statute in that country until in 1848. But even in levying a *fine*, it was necessary that the wife should do so as a *femme sole*, in order that her coverture would not appear of record in the proceedings and be joined therein by her husband, and she examined privily and apart from her husband by the court passing on the fine. Where this was done and the fine was avoided by the husband in his lifetime, the wife and her heirs were ever thereafter estopped by the fine; for she was thereby estopped by the record from setting up that she was then a *femme covert*. 2 Rop. Husb. & Wife, 141. But if she levied the fine alone, showing coverture, it would neither bind her nor her heirs. *Idem*; Cruise, tit. "Fines," c. 5, Sec. 12. So that, at common law, a married woman could not convey her real estate either separately or in connection with her husband; and her attempt to convey the same imposed no obligation on her whatever and was utterly void. As a result of such conditions the *corpus* of her realty was simply beyond the reach of both husband and wife, and on her death passed to her heirs, subject to his curtesy; and so the law remained until the invention of fines and recoveries. But, under fine and recovery, it was competent for the husband to enter and avoid the fine for the benefit of the wife, her heirs and himself.

Another significant feature respecting this manner of conveyance of the wife by fine, was that

she must be examined by the court privily and apart from her husband to ascertain whether she had joined in the fine of her own free will, or was compelled to do so by threats, menaces and compulsion of the husband. The disability of coverture was, at common law, created for her own benefit and protection in the transfer and disposition of her estate in realty, and was ever guarded with the greatest precaution by the courts and the law of the land. To relieve against these conditions at common law, legislatures have, from time to time, provided means for the alienation of married women's real estate, gradually deviating from these rigid rules until in some states she is now empowered to convey her lands as "*a femme sole;*" while in other states a mode of conveyance is provided by which she can convey the same by her husband joining in the deed, and she being examined privily and apart from her husband, and making certain declarations and acknowledgments therein provided; but at the same time adhering to the same rigidity as the common law, to the strict compliance and observance of these statutes which were modeled after the provisions and requirements observed in fines and recoveries. Such as the latter are the provisions of said section 659 of chapter 27 of the Statutes of Arkansas, relative to the acknowledgment of a married woman as to her own lands and the relinquishment of her dower in her husband's lands; but, in addi-

tion to the provisions of that section, section 648 of that chapter provides:

> "A married woman may convey her real estate or any part thereof by deed of conveyance, executed by herself *and her husband*, and *acknowledged* and *certified* in the *manner* hereinafter *prescribed*."

And section 649 of that chapter provides:

> "A married woman may relinquish her *dower* in any of the real estate of her husband by joining *with him* in a deed of conveyance thereof, and acknowledging the same in the manner hereinafter prescribed."

Thus, the court will observe, the footprints of this ancient law relative to the alienation of married women's real estate are plainly visible in these three sections, 648, 649 and 659; that her rights and powers of alienation are rigidly provided for and circumscribed in those sections; and that she could not, under the law, as it existed on the 15th of January, 1907, when the deed in controversy was made, alienate her lands or dower interest in her husband's lands, in any manner other than is strictly and specifically provided for in said sections.

Here we might observe, but, as everybody knows, that, unless the legislature of the state in which the land lies enacts a provision by which married women can alienate their lands, that the common law and ancient rules still exist, and are binding on such conveyances. And even where there is an enactment of such legislature, modifications in

these respects go no further than the strict construction of that enactment, except where they are thereby empowered to convey as "*a femme sole*," and in investigating the extent of these enactments it becomes necessary always to recur to this common law to ascertain their power and modifications. Brewster on Conveyancing, section 359; *Clark* v. *Clark*, 16 Ore. 224, 226, 18 Pac. 1, where these matters are fully discussed.

The court will observe that section 648 pertains to the conveyance of her own lands, and section 649 to her relinquishment of dower in her husband's lands; but neither of them are complete without section 659, which provides for the manner of *acknowledging* and *authenticating* the instrument. But at this point we desire to call the special attention of the court to the express provisions of this section 659. It provides for the acknowledgment of the married woman; but observe, that acknowledgment is different as to her *own lands* from that of her *relinquishment* of *dower*, and the certificate of the officer taking it must likewise be different and contain this distinction, indicating whether the deed is a conveyance of her own lands or her relinquishment of dower.

The deed certificate of acknowledgment of plaintiff in error is fully set out in her answer purposely for this comparison; and upon examination thereof, we find it certified in that certificate that "Martha

J. Adkins, the wife of said W. B. Adkins, * * * declared that she had, of her own free will (done what?) signed the relinquishment of dower therein expressed," etc. Section 659 provides that she must declare "that she had of her own free will *executed the deed* (if the deed related to her own realty), or instrument in question (same), or that she had signed the relinquishment of dower for the purposes therein contained." So, the officer understood and so certified that the plaintiff in error, in the execution of the deed in controversy, relinquished simply her dower in these lands mentioned in the deed; for he has the exact language of section 659, so provided in that section for the alienation of dower, except the word "expressed" is substituted for the the word "contained," used in the statute. These words, "therein expressed," used in that certificate relate to interest of plaintiff in error "*expressed*" in the deed, which expressly and confessedly is simply her dower in the lands, and so specified on the face of the deed. In order for a married woman to alienate or relinquish her dower in her husband's lands, section 659 specifically provides that she must do so "by joining with him in a deed of conveyance thereof." That is just what the plaintiff in error did in the case at bar. She followed the specific mandates and emphatic requirements of that section in executing that deed; and now the defendant in error maintains that because she did so, she converted that deed into a fee

simple deed, conveying her own lands, and that Jake F. Arnold took the fee simple thereto under said deed and conveyed good title to the defendant in error, Henry C. Arnold, by that mortgage. This is a far-fetched conclusion, and is not sustained by the law governing such cases.

The certificate of acknowledgment of an officer to a deed is taken as a verity and cannot be varied, enlarged or impeached, except for fraud, duress or some personal disability of the grantor. It is a judicial or *quasi*-judicial act and cannot afterward be contradicted except as above stated: *Hitz* v. *Jenks*, 123 U. S. 297; 31 L. ed. 156; *Drury* v. *Foster*, 69 U. S. 17; .. L. ed. 780, 781; *Young* v. *Duvall*, 109 U. S. 573, 577; 27 L. ed. 1036, 1038; *Comeggys* v. *Clark*, 44 Md. 108; *Jamison* v. *Jamison*, 3 Whart. 457; *Williams* v. *Baker*, 71 Pa. 476; *Harkins* v. *Forsyth*, 11 Leigh. 294; *Greene* v. *Godfrey*, 44 Me. 25; *Baldwin* v. *Snowden*, 11 Ohio St. 203; *Graham* v. *Anderson*, 42 Ill. 514; *Dolph* v. *Barney*, 5 Oreg. 191; *Johnson* v. *Wallace*, 53 Miss. 331; *Hartley* v. *Frosh*, 6 Tex. 208; *Bancks* v. *Ollerton*, 10 Exch. 168, 182; and *Central Land Co.* v. *Laidley*, 32 W. Va. 134, 9 S. E. 61, 3 L. R. A. 826, 25 Am. St. R. 797. The fact of this last case has been so extensively reported and thus preserved bespeaks its importance, and justifies its careful consideration. This is a very noted case and one of great importance and involving the lands on which the City of Huntington, W. Va., was and still is situated. Collis P. Huntington was a pur-

chaser of this 240-acre tract, and for whom this town was named. On the 25th of February, 1870, Sarah H. G. Pennybacker and husband, John M., made a deed for these lands with a defective acknowledgment as to her (she being the owner of the lands), to said Huntington. October 16, 1871, Huntington made a deed therefor to the Central Land Company, and they took possession of the lands. On the 5th day of May, 1881, the husband of Mrs. Pennybacker died, and on the 26th day of January, 1882, she made another deed for the same 240 acres of land to John B. Laidley, who, thereunder, brought an action of ejectment against the Central Land Company and numerous other persons claiming under it, for the possession of the lands, on the grounds that the deed from Mrs. Pennybacker and husband to Huntington, dated the 25th of February, 1870, was not executed and acknowledged by the wife, the owner of the lands, in the way and manner prescribed by the statutes of the State of West Virginia. It was there held that Laidley was entitled to the lands because of this fact, and decreed to him accordingly. To the same effect are *Gillespie* v. *Bailey*, 12 W. Va. 70, 29 Am. Rep. 445; *Laughlin Bros. & Co.* v. *Fearn*, 14 W. Va. 322; *Laidly* v. *Knight*, 23 W. Va. 735; *McMullen* v. *Eagan*, 21 W. Va. 233; *Blair* v. *Sayer*, 29 W. Va. 604, approved in *Laidley* v. *Central Land Co.*, 30 W. Va. 505; *Watson* v. *Michael*, 21 W. Va. 568; *Hanley* v. *Nat. Loan Co.*, 44 W. Va. 450, and *Cecil* v. *Clark*, *id.* 659. As

to this Statute of West Virginia relative to conveyances and acknowledgments of married women, the court will find from an examination of the old statutes under which these decisions arose (not the new statute), that it was practically the same as section 659 of Arkansas; and this West Virginia statute was copied from the laws of Virginia in which last state the same principles were adhered to, as may be seen from the following decisions: *County* v. *Geiger*, 1 Call. 193; *Harvey* v. *Peck*, 1 Munf. 518, holding privy examination must take place; *Hartshorn* v. *Randolph*, 12 Leigh 495, holding that the certificate must show the deed was fully explained; that she *declared* that she did not wish to retract it; and *Grove* v. *Zumbero*, 14 Gratt. 501.

The law of these two states requires a deed of a married woman to be joined in by her husband, and she to acknowledge the deed separate and apart from her husband, and make certain declarations, practically the same as the above cited sections of Arkansas.

We will next take up the decisions of the Supreme Court of Arkansas, from which state this statute in controversy was taken, and apply the decisions arising under chapter 27 of those statutes, to the case at bar.

In the case of *Little* v. *Dodge*, 32 Ark. 453, it was held that any substantial deviation from the forms prescribed by the statute for the conveyance

of real estate of married women will render the deed invalid. In *Wentworth* v. *Clark*, 33 Ark. 432, and *McGehee* v. *McKenzie*, 43 Ark. 156, it was held that prior to the Constitution of 1874, the deed of a married woman, not acknowledged according to the statute, is absolutely void and a nullity, and not capable of confirmation. In *Rogers* v. *Brooks*, 30 Ark. 612, it was held that the husband's contract to sell the wife's land, though known and *assented to by her*, was not binding on her or her heirs; that she could only bind herself by executing a deed in the form prescribed by law. In the case of *Conner* v. *Abbott*, 35 Ark. 365, the court held that, prior to the Constitution of 1874, a mortgage of a married woman of her lands as a *femme sole*, is void; and, in a suit to foreclose the mortgage, a court of equity will protect her, though she make no defense against it; that in such case it was the duty of the chancellor to examine her as to her wishes, and to see that her assent is intelligently and freely given. In *Stidham* v. *Mathews*, 29 Ark. 650, and *Wood* v. *Perry*, 30 Ark. 385, it was held that the executory contract or bond of a married woman for the transfer of her lands was void and non-enforceable; and, in the former, it was held that, under the statute, an acknowledgment upon privy examination of the wife was requisite to the validity of the wife's conveyance or relinquishment of dower, and that the husband must join in her deed. In *Jones* v. *Freed*, 42 Ark. 357, the court held that, in order to pass her

title to real estate, under that statute, apt words of conveyance must be used by the married woman. She must join her husband not only in the formal execution of the deed, but in the operative words of the grant: *but, that a relinquishment of dower will not carry the fee.* In *Witter* v. *Briscoe*, 13 Ark. 422, the court held that a married woman may relinquish her dower by joining in her husband's deed and acknowledging the same in proper form; and in *Meyer* v. *Gossett*, 38 Ark. 388, that when a husband's deed is *followed by a paragraph relinquishing dower, and then followed by the signatures of both husband and wife, that this is such joining in the deed as is required for the relinquishment of dower.* That is the case at bar exactly. The face of the deed shows her relinquishment of dower in express words; and it is followed by the signatures of both husband and wife; and in addition thereto her relinquishment of dower is acknowledged in the certificate of acknowledgment to the deed. In this, there is no uncertainty whatever in the deed. Again, in *Dutton* v. *Stuart*, 41 Ark. 101, that court held that a married woman could relinquish her dower in her husband's lands by simply joining in her husband's deed and acknowledging the relinquishment of dower in the form prescribed in section 659, *without any clause of relinquishment of dower in the deed.*

These last decisions show the construction which the Supreme Court of Arkansas has put upon these

several sections of its own statute, and those decisions are final and conclusive as to the sections of said chapter 27 of the statutes of that state on all courts attempting to pass on them; for it is a rule of law, as everybody knows, that where the statutes of one state are adopted by another state, the construction of the statute adopted by the court of last resort of the mother state is also accepted and adopted by the state adopting the statute.

But, at this point, there is another thing to which we desire to call the attention of the court, in connection with these sections, and that is: Section 659 expressly provides that the title to the married woman's lands passes only through her proper acknowledging of her deed for it. It follows therefore, that unless properly acknowledged, the title does not pass by her pretended deed; and where that is the case, according to the above cited Arkansas decisions, as well as the general law on the subject, she could not be compelled to make a proper deed even where she had given possession thereunder. But, in the case at bar, the plaintiff in error still holds possession of the lands in controversy in this suit, and has had the possession thereof ever since the execution of the deed of her husband on the 15th of January, 1907.

By the law and numerous decisions above cited, we have sought to show, *1st*, that under the common law, a married woman could not alienate her

real estate in any manner whatever; *2nd*, the gradual encroachment upon the common law of legislative enactments, and the zealous care and precaution ever exhibited by legislative authority as to her rights and powers of alienation; *3rd*, the constant safeguards and restrictions thrown around her in any attempt to dispose of or convey her property; *4th*, that courts, in passing upon these legislative enactments, modifying the common law, never construe them to her prejudice, but in accordance to the strict provisions of the statutes, ever mindful of her disabilities at common law, and refusing to extend those statutes further than their express provisions direct; *5th*, and that courts never so construe a married woman's deed so as to enlarge the provisions or scope of that deed, and thereby hold the deed to pass a greater estate than was intended or a strict construction of that deed would justify under the common law.

We think that, under chapter 27 of the Statutes of Arkansas, there is no room for doubt that the deed of January, 1907, passed no right, title or interest whatever of the plaintiff in error, in and to the lands in controversy in this suit, to defendant in error, Jake F. Arnold; and that, therefore, her rights and interests therein were not passed or prejudiced by the mortgage given thereon by said Jake Arnold to the other defendant in error, Henry C. Arnold, and that the decree herein declaring that

she had no interest in these lands and decreeing them for sale to satisfy said mortgage was a fatal error in the court below, and the case should be reversed and dismissed as to this 80 acres of land, with costs to plaintiff in error.

But the defendants in error may contend that chapter 104, of the Statutes of Arkansas, and not chapter 27 thereof, is the law governing this case. Section 1 of chapter 104 permitted a married woman to convey her real estate as a *femme sole*. But the court will observe that that statute arose under the Constitution of 1874 of Arkansas, long after chapter 27 had been in full force and the above decisions principally had been rendered construing the latter statute. This should be kept constantly in mind by the court in passing upon this case; because, after that constitution went into effect in 1874, the Supreme Court of Arkansas changed their line of decisions as to the rights of married women to convey their separate estate, and many decisions to that effect may be found but they arose under this new constitution by which this law was entirely changed from what it was under chapter 27 thereof. In his inestimable work, Indian Land Laws, Mr. Bledsoe, on page 108, seems to be of the opinion that chapter 104 takes precedence over chapter 27, wherein he says, "Such a conveyance made by a married woman and acknowledged as a *femme sole* would probably pass title to her land;" but on the next page cites numerous decisions of the Supreme Court

of Arkansas in which chapter 27 had been construed, holding the same as we have heretofore shown in this brief. To his view of this matter, we can not agree, for the reasons hereinafter given.

The Acts of Congress involved in this case and their construction, are as follows: Creek Treaty, approved March 1, 1901, under which plaintiff took title to these lands; Act of May 2, 1890, putting in force chapter 104 of the Digest of Arkansas, relative to married women's property; Act of February 19, 1903, relative to conveyancing and deeds of married women.

In determining the rights of the parties to this suit, we contend that each and every one of these laws of Congress should be considered and construed, in the way and manner hereinafter indicated.

In Black on Interpretation of Laws, on page 212, Sec. 87, the author lays down the proposition that "When a resort to extrinsic evidence becomes necessary, in the construction of a statute, it is proper to consider the facts of contemporary history, and especially the evil which the statute was designed to correct and the remedy intended," citing many decided cases to substantiate his position, among which is *U. S. v. Union Pacific R. R. Co.*, 91 U. S. 72.

Then looking to the contemporaneous history of Indian Territory, at the various times these statutes of Congress were passed, we find that the title

to all the lands of the Territory was vested by the Louisiana Purchase in the United States, in 1803, and remained there until about the year 1832 when it was transferred to these Indian Tribes, under and by virtue of these socalled Treaties with these Indians, enacted about that time and afterward, where it remained simply as a dry trust title, until the allotment of the same under the Dawes Commission.

The first Creek treaty which became effectual as a law was the one approved on March 1st, 1901, the Treaty of June 28, 1898, having failed of ratification by the Creek citizens as therein provided; the next is that of May 27, 1902, taking effect July, 1902, and the next that of June 30, 1902, known as the Supplemental Treaty, ratified by the Creek Council on the 26th of July, 1902, and approved and proclaimed by the President, on the 8th of August, 1902.

So it may be seen that not a single human being owned, or was entitled to own, a foot of land in Indian Territory from any point of time, dating from the earliest times to the allotment of these lands under the Dawes Commission, the title thereto being in Spain, France and the United States up to about 1832, and after that time in these several Indian tribes which held the same simply as trustees for the purposes of these treaties.

The several individual Indians and freedmen of these tribes were never entitled to the lands *in severalty;* and, therefore, never had any vested interest in them or right or control over them, as private individuals, until they were partitioned by these allotments under the Dawes Commission. *Delaware Indians* v. *Cherokee Nation,* (1904) 193 U. S. 136, 48 L. ed. 651, and cases therein cited.

As above stated, the first law under which a Creek citizen could take lands in severalty, in the Creek Nation, was the Creek Treaty, approved March 1st, 1901; and it was under this treaty that the plaintiff in error took the land in controversy in this suit. It will be remembered that plaintiff's child died in November, 1901, leaving her as its lawful heir.

Defendant in error defends and claims title, under section 1 of chapter 104 of said Digest, put in force by an Act of Congress, dated May 2, 1890, which section reads as follows:

> "The real and personal property of any *femme covert* in this state, acquired either before or after marriage, whether by gift, grant, devise, inheritance or otherwise, shall, so long as she may choose, be and remain her separate estate and property, and may be devised, bequeathed or conveyed by her the same as if she was a *femme sole;* and the same shall not be subject to the debts of her husband."

That section of said Act of Congress putting that chapter in force is as follows:

> "*Sec. 31* (Laws of Arkansas applicable). That certain general laws of the State of Arkansas in force at the close of the session of the general assembly of that state of eighteen hundred and eighty-three as published in 1884, in the volume known as Mansfield's Digest of the Statutes of Arkansas, which are not *locally inapplicable* or *in conflict with this act* or *with any law of Congress*, relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory *until Congress shall otherwise provide*, that is to say, the provisions of the general Statutes of Arkansas relating to administration act." (Which includes chapter 104, above referred to. See page 406 Vol. 3, Annotated Statutes.)

Now it is to be observed that the above act puts these chapters in force in Indian Territory "*which are not locally inapplicable—relating to the subjects specially mentioned in this section.*" Then was section 1 of chapter 104 above quoted "applicable" or "locally inapplicable" in Indian Territory? It could be applicable as to personal estate, but not as to *real estate;* because, as above shown, no one—married woman or otherwise—owned a foot of land in said territory. Consequently, the statute could not possibly operate or be "locally applicable" to the transfer of married women's lands, at the time the Congress passed the act nor up to

the time when these lands were allotted under the Dawes Commission, because until that time, no married woman had any lands to convey in this territory. Nor did they, in the Creek Nation, have any lands until the allotment under the Treaty of March 1, 1901; then query: Did chapter 104 *as to real estate* remain in abeyance until this allotment and then settle down upon these lands; or did it never exist at all from the beginning? Then again, can a law, non-enforcible because there is no object or subject-matter upon which it can act, exist at all, or be in abeyance till such subject-matter comes into existence? We submit that, at common law, statutes became effectual from their passage: Vol. 26, Am. & Eng. Cyc., page 562, and thereafter. But, in order to become enforcible or really to have a valid or legal existence, the subject-matter of the statute must have an actual existence, or there must be a provision for its potential existence or future operation, such as in local option laws and the like. We maintain that Congress never intended that chapter 104 should be put in force in Indian Territory as to real estate of married women; because they had no real estate they could convey or upon which it could operate. Again, we submit that the statute itself shows upon its face that Congress never intended chapter 104 to go into effect as to real property of married women. *1st*, because there is an express provision in said section 31 wherein these statutes were put in force that curtailed them

as to all matters wherein they were "*locally inapplicable.*" We have shown that their application to the transfer of married women's real property is an absolute impossibility; and, therefore, became inoperative even if Congress had intended to pass it; *2nd*, because the proper interpretation of that chapter and chapter 27, construed together, show conclusively that it was never the object or purpose of Congress to make that chapter the law of conveying married women's real estate in Indian Territory.

Courts must ascertain the legislature's meaning from the words used and from the subject-matter of the statute; and they must restrain its operation within narrower limits than its words import if literal meaning would extend it beyond legislative intent. *Petri* v. *Commercial Nat. Bank*, 142 U. S. page ...., 35 L. 1146, Bk. XII U. S. Notes 102; *McBroom* v. *Scottish Mrg., etc., Investment Co.*, 143 U. S. 323, 38 L. ed. 729, Bk. XII U. S. Notes 575; *Market Co.* v. *Hoffman*, 101 U. S. 116, 25 L. ed. 782, Bk. IX U. S. Notes 919; *U. S.* v. *Goldenberg*, 168 U. S. 103, 42 L. ed. 394; see also, Vol. 26 Am. & Eng. Ency. page 602, and also 3rd Vol. of Rose's U. S. Digest, page 2396.

Intention of law makers is to be deduced from the whole statute, and from comparison of other statutes in *pari materia*. *Kohlsass* v. *Murphy*, 96 U. S. 159, 160, 24 L. ed. 844, Bk. IX U. S. Notes 395;

Atkin v. *Disintegrating Co.*, 18 Wall. 301, 21 L. ed. 841, Bk. VIII U. S. Notes 175; *U. S.* v. *Saunders*, 22 Wall. 494, 496, 22 L. ed. 736, Bk. VIII U. S. Notes 540.

So that to pass upon the intent of Congress in passing chapter 104, and the scope intended to be covered under this chapter, we can also consider chapter 27 and its provisions and purpose, as it is *pari materia*.

It is a significant fact that there was no law in Indian Territory by which to make transfers generally of the title to real property until the 19th of February, 1903, when Congress passed the act putting chapter 27 in force. Can it be said with consistency that Congress was more solicitous of facilitating the transfer of title to married women's lands than of married men or any one else? The very fact that Congress did not provide generally for the transfer of lands in this territory is practically conclusive that Congress did not intend to provide a means by which a married woman could convey or dispose of lands which she did not have. Then again, under this same rule above referred to respecting statutes *pari materia*, I further call attention to the fact that Congress itself vested all title to these lands in the Five Civilized Tribes by its own enactments. Consequently, it must be considered that Congress had this fact in view when it passed this law on May 2, 1890, and for that rea-

son made the express provision limiting their application, and making the provision they were not to be applied where "*locally inapplicable;*" and also for the same reason, Congress, in order to make provision for the transfer of real estate throughout this territory, passed that law on the 19th of February, 1903, adopting chapter 27 of Arkansas. This statute makes ample provision for the transfer of lands of all classes of persons—whether married or single, men or women—and must be taken to be the law provided by Congress for the transfer of lands in this territory.

Then again, let us suppose that chapter 104 did once exist in full force in this country. Still we insist that it was repealed as to the manner of conveying the lands of married women, by the Act of Congress, passed on the 19th day of February, 1903, putting in force in this country chapter 27 of Mansfield's Digest of 1884. This act may be found on page 130, Vol. 10 of Fed. Stat. Annotated.

The Act of May 2, 1890, putting in force chapter 104, expressly provides that said chapters are hereby extended over and put in force in the Indian Territory *until Congress shall otherwise provide.* Now Congress did "otherwise provide" on the 19th day of February, 1903, by said act, putting in force chapter 27. This statute is applicable, for it not only makes provision for the *recording of instruments*, which seems not to have done before, but it,

likewise, provides the manner in which lands must be conveyed by all persons. Section 1 of chapter 104 provides that a married woman may convey her lands as a *femme sole*; but section 648 of chapter 27 provided that she must be joined by her husband in her conveyance, and section 659 provides she must acknowledge it separate and apart from her husband and declare it was of her own free will and accord, and the officer's certificate must show these matters. So these two statutes are repugnant and irreconcilable as to the manner in which a married woman can sell and convey her separate real estate.

The former is, therefore, repealed by the latter, if not expressly then by necessary implication, as may be seen by the following authorities:

If there is a positive and irreconcilable repugnancy between the old law and the new, the former must fall, *Barney* v. *Dolph*, 97 U. S. 656, 24 L. 106, Bk. IX U. S. Notes 591; *U. S.* v. *Cillis*, 95 U. S. 416, 24 L. 503, Bk. X U. S. Notes 275; *King* v. *Cornell*, 106 U. S. 396, 27 L. 60, Bk. X U. S. Notes 396; *Fisher* v. *Henarie*, 142 U. S. 468, 35 L. 1080, Bk. XII U. S. Notes 92; *Wood* v. *U. S.*, 16 Pet. 363, 10 L. 987, Bk. IV U. S. Notes 181; *Daviess* v. *Fairbain*, 3 How. 643, 11 L. 760, Bk. IV U. S. Notes 466; see numerous other authorities cited on pages 2383, 2384, 2385, Vol. 3 of Rose's Digest of U. S. Reports to the same effect.

Enactment of provisions inconsistent with those previously existing, or plainly intended as a substitute for them, *manifests a clear intent to abolish the old law. Henderson's Tobacco*, 11 Wall. 657, 20 L. 235, Bk. VII U. S. Notes 502; *McKee* v. *U. S.*, 8 Wall. 167, 20 L. 235, Bk. VII U. S. Notes 33. *Von Hoffman* v. *City of Quincy*, 4 Wall. 549, 18 L. 703, Bk. VI U. S. Notes 632. See specially *District of Columbia* v. *Hutton*, 143 U. S. 18, 36 L. ed. 60.

From the above decisions, I take it that it is fully established by them that Congress abolished chapter 104 as to married women's real estate and substituted therefor chapter 27, and the same became the law of conveyancing from the 19th day of February, 1903, to the 16th of November, 1907, at the time of statehood, and was the law on the 15th of January, 1907, when plaintiff in error relinquished her dower by said deed.

Then what is the consequence? It, of course, will be remembered that both chapters 104 and 27 were adopted by Congress from the Statutes of Arkansas; and we find that where an Act of Congress is taken from a state statute, the prior construction of the latter by the state court must be construed as having been also adopted by Congress with the text thus expounded. *Willis* v. *Eastern Trust Co.*, 169 U. S. 307, 42 L. 752, Bk. XII U. S. Notes 1022; *Capital Traction Co.* v. *Hoff*, 174 U. S. 36, 43 L. 873; *Metropolitan R. R.* v. *Moore*, 121 U.

S. 572, 30 L. 1022, Bk. XI U. S. Notes 359. Statute taken from the code of another state is presumed to be taken with its meaning as judicially determined there. *Henrietta Min. Co.* v. *Gardner*, 173 U. S. 130, 43 L. 637.

Under the guidance of these last citations from the Supreme Court of the United States, we are at liberty to again examine the Supreme Court decisions of Arkansas, relative to the effect of a married woman improperly executing her deed for her lands under chapter 27, and in a way and manner different from that provided in said statute.

In the case of *Stidham* v. *Mathews*, 29 Ark. 650, it is held that "Under our statute, an acknowledgment upon privy examination is requisite to the validity of a wife's conveyance or relinquishment of dower, and the husband must join in the deed;" and that "a married woman can not, under the statute, execute a title bond or executory contract to convey land." And in *Wood* v. *Terry*, 30 Ark. 385, it is held that "the executory and unacknowledged contract of a married woman to convey her estate, is void"; and in *McDaniel* v. *Grace*, it is held that "A married woman residing in Louisiana can convey land in Arkansas only in the manner prescribed in the statute;" see 15 Ark. 465; in *Rogers* v. *Brooks*, 30 Ark. 612, it is held that "A contract on the part of the husband to sell the wife's land, though known and assented to by her, is not binding

on her or her heirs. She can only bind herself by executing a deed in the form prescribed by law." In *Little* v. *Dodge*, 32 Ark. 453, it is held that "Any substantial deviation from the forms prescribed by the statute for the conveyance of real estate by married women will render the deed invalid" and "A substantial compliance with the statute must affirmatively appear from the certificate of acknowledgment." In the case of *McGehee* v. *McKenzie*, 43 Ark. 17, 158, it is held that "Prior to the Constitution of 1874, the deed of a married woman, not acknowledged according to the statute, is absolutely void and a nullity, and incapable of confirmation," the same also in *Wentworth* v. *Clark*, 33 Ark. 432. See also pages 475, 476 of Vol. 1, of Crawford's Digest, and page 279, Notes of Mansfield's Digest of 1884, for other citations on this subject.

The decisions of the Supreme Court of Arkansas construing these statutes put in force by Congress in the Indian Territory and so decided prior to this enactment of Congress, were followed by the United States Courts in Indian Territory and the Circuit Court of Appeals, as shown by the following decisions: *Appolos* v. *Brady*, (C. C. A. 1892) 49 Fed. Rep. 401; *Sanger* v. *Flow*, (C. C. A. 1891), 48 Fed. Rep. 152; *Rainwater-Boogher Hat Co.* v. *Malcolm*, (C. C. A. 1892), 51 Fed. Rep. 734; *Boyt* v. *Mitchell*, (Indian Terry. 1901) 64 S. W. Rep. 610; *Zufall* v. *U. S.*, (1898) 1 Indian Ter. 638; but a subsequent decision thereof by said Supreme Court, is

only persuasive, *Noyes* v. *Neel*, (C. C. A. 1900) 100 Fed. Rep. 555. These Arkansas Statutes thus adopted by this Act of Congress thereby became an Act of Congress as much as if they had been enacted by Congress in *haec verba*, *in re Grayson*, (1901) 3 Indian Terr. 497.

In 1874, Arkansas adopted a new Constitution from which section 1 of chapter 104 was taken literally. So the decisions of Arkansas after that time were different from the above decided cases passed under the old Constitution and relative to chapter 27 which Congress put in force Feb. 19, 1903. So we are bound by the decisions under chapter 27, and not under the new constitution, wherein the provisions of conveyances of married women were the very reverse of what they were before, and the new decisions would tend to confusion on this subject unless this was kept in mind.

Other states having similar laws respecting the manner of conveyances by married women have held and construed them the same way as Arkansas. Virginia and West Virginia and New York have such laws, and have held the same way. In fact, these laws, I believe, were taken substantially, Rev. Stat. N. Y. Vol. 3, pp. 239 to 241; secs. 75 to 86; p. 509, sec. 114, and laws of N. Y. 1860, ch. 90.

The following are the Virginia decisions: *Sayers*, 26 Gratt. 354; *Porte*, 27 Gratt. 599; *Leake*, 29 Gratt. 153; *Harris*, 31 Gratt. 13, 33; *Garland*, 32

Gratt. 305, 314; *Irvine*, 32 Gratt. 411; *Carpenter*, 75 Va. 129; *Muse*, 77 Va. 57; *Breeding*, 77 Va. 639; *Gralle*, 79 Va. 182, 188; *Chapman*, 83 Va. 392; *Duggar*, 84 Va. 130, 424, 432; *Alexander*, 85 Va. 353; *Welch*, 85 Va. 441; *Yates*, 86 Va. 117; *Hutchings*, 91 Va. 68; *Campbell*, 92 Va. 68; *Kiracofe*, 93 Va. 592; Graves Real Prop., 97-8, 130-8, 2 Min. Inst. 128, 728, 864 and 928.

West Virginia decisions: *Ogle*, 12 W. Va. 241; *Jones*, 12 W. Va. 359; *Radford*, 13 W. Va. 572, 674; *Goatney*, 14 W. Va. 338; *Weinberg*, 15 W. Va. 829; *Miles*, 18 W. Va. 75; *Williamson*, 18 W. Va. 912; *Forsythe*, 19 W. Va. 318; *McMullen*, 21 W. Va. 568; *Moore*, 22 W. Va. 292; *Laidley*, ... W. Va. 735; *Core*, 27 W. Va. 206; *McKenzie*, 27 W. Va. 306, 555, 644; *Burt*, 29 W. Va. 441; *Moore*, 30 W. Va. 146, 222, 554; *Hutson*, 31 W. Va. 358; *Smith*, 32 W. Va. 14, 134, 203, 299; Cas. to 33 W. Va. 449, 501; *Robinson*, 34 W. Va. 128, 442, 563, and numerous decisions in subsequent reports of said state.

For further authority on the acknowledgment of married women as to their separate real estate, we refer the court to section 548 and thereafter for several sections of Vol. 1 of Devlin on Real Estate and Deeds (third edition), where there may be found many decisions of different states of the Union and of this court on that subject.

We also refer the court to the case of *Robinson & Co.* v. *Belt et al.*, 187 U. S. 41, 47 L. ed. 65, which

involved the construction and application of one of the Statutes of Arkansas spread over Indian Territory by said Act of Congress of May 2, 1890, and in which this court held:

> "The courts of Indian Territory are bound to respect the decisions of the Supreme Court of Arkansas interpreting laws of that state, which were adopted and extended over the Indian Territory by the Act of Congress of May 2, 1890."

See also the foot notes to said case, as to other decisions of the federal courts.

In construing Acts of Congress, courts must look at the state of things then existing, and in the light then appearing, *Platt* v. *Union Pac. R. R.*, 99 U. S. . . . . , 25 L. 424, Bk. U. S. Notes 691; the guide to the meaning of a statute is found in the evil which it is intended to remedy or provide for, and for this, the court looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislature, *Siemens* v. *Sellers*, 123 U. S. 285, 31 L. 153, Bk. X U. S. Notes 417; and to ascertain that legislative intent, the condition of the country at the time of the passage of the act, as well as the purpose declared, must be looked to and all its parts read together, *U. S.* v. *Denver R. R.*, 150 U. S. 14, 37 L. 975, Bk. XII U. S. Notes 425; *Holy Trinity Church* v. *U. S.*, 143 U. S. 463, 36 L. 226, Bk. XII U. S. Notes 135.

Following in the light of these authorities, we are justified in looking at the past only to discover that from the beginning of this government it has been the policy of the Congress of the United States to throw every safeguard around the Indian possible to protect him and his property from waste and destruction. This is especially true of the Five Civilized Tribes ever since they were removed to this country. So jealous has it been that only in the most recent years have they been allowed to have lands in their own name, and even then with iron-clad restrictions on them.

So we can not consistently come to the conclusion that Congress intended the easy manner provided in chapter 104 of conveying married women's lands in this country after so jealously guarding them always before that; and especially would that seem true when we consider that Congress put chapter 27 in force almost thirteen years after the other, and at the very time when these lands, for the first time, became vested in fee.

From these authorities we insist that the law governing the sale and conveyance of lands in Indian Territory, from and ever after the 19th day of February, 1903, was chapter 27 of the Statutes of Arkansas, and that married women had to convey their lands thereunder by having their husbands to join in their deeds therefor and then acknowledge the deed separate and apart from their husbands

as provided in Sec. 659 thereof, and, unless this is done, all such deeds are absolutely null and void.

From the nature and character of this decision of the trial court, it is difficult to ascertain what theory was adopted by the court below—whether the plaintiff in error never had any right, title or interest in the lands in controversy at any time, or whether she inherited the same or it passed to her by operation of law, on the death of the child, and upon the execution of this deed of January 15th, 1907, she conveyed it away to Jake F. Arnold. So far, we have been going on the theory that the court below supposed the plaintiff in error took these lands in some way after the death of the child and then by that deed conveyed them to said Arnold; and that said Jake F. Arnold then had the power, and did convey them to defendant in error, Henry C. Arnold, under that mortgage. Under that theory, we have written the preceding part of this brief arising under the second and fifth assignment of error, and respectfully submit that such a theory was wrong, for the reasons herein assigned, and that the case should be reversed and dismissed with costs to the plaintiff in error.

We will next take up the theory that the court acted on the notion that the plaintiff in error never had any right, title or interest in the lands in controversy. This branch will necessarily be very short; because, at this late date, we do not suppose

that any one conversant with the decisions of the court rendered in the case of *DeGraffinreid et al.* v. *Iowa Land & Trust Co.*, 20 Okla. 687, and *Irving* v. *Diamond*, 100 Pac. 557, would have much doubt about the plaintiff in error owning this land on the 15th of January, 1907, when that deed was made. The child died in November, 1901, intestate and without descendants. This is what is alleged in her answers and cross petitions and that she never received any part or portion of the consideration for said lands or any consideration whatever for the same.

On these demurrers and motion for judgment, all these allegations are taken as true and can not now be denied. The court will observe that plaintiff was in possession of the lands and always had been since they were allotted; and having never received any consideration whatever for the lands, she can not, under the decisions heretofore cited, be dispossessed thereof, or the lands sold away from her. She charges most specifically that she never received, directly or indirectly, any consideration for the lands, and ever thereafter held possession thereof, claiming the lands as her own and still holds the same in her individual right and title. Therefore, there was a complete want of consideration of the undertaking even if she had ever bargained to sell the same.

As to the effect of the deed of January the 15th, 1907, herein referred to we have gone to considerable length in this brief, because, in our humble judgment, it involves a matter of vast and incalculable importance to the people of the eastern part of this state. Whether, before statehood, a married woman had to execute her deed for her lands as provided in said chapter 27, or in accordance with chapter 104, has never, to our knowledge, been passed on by this court. Upon that decision will depend hundreds of thousands, if not millions, of dollars' worth of real property. In the earlier transfers of real property in old Indian Territory, it may have been supposed that chapter 104 was the law by which the conveyances of married women were to be made. This chapter was incorporated in the Indian Code and may be found therein commencing with page 511, Sec. 3021 and designated as chapter 49. But chapter 27 was not incorporated in said code, as it was adopted by Congress on the 19th of February, 1903, *after* this code was published in 1899. But the result of this carelessness is apparent; and while the amount involved in this suit is comparatively small, the case involves the decision of this vastly important feature which, in our humble judgment, will be as far-reaching in results, perhaps, as any such Indian case as has ever yet been presented to this court; and we believe it merits the highest consideration and most careful investigation.

Before closing this brief, I desire to say that commencing with page 43 of the record practically all of the subsequent part of the record except the opinion of said Supreme Court extending from page 53 to 62, inclusive, is practically of little or no use or benefit in this case; and how the same happened to be put in this record I do not know, and had no knowledge that such matters were contained therein until I received the printed record. The record, even including the journal entries, and the opinion of said Supreme Court, is also full of errors, but whose fault this is, I likewise do not know. The record contains motions and petitions for rehearing filed in said Supreme Court, and the argument of counsel on each side and citation of authority, none of which have a proper place in this record and was never intended by me to be included in the same, but the same was so done without my knowledge. Had the petition for a rehearing filed by the plaintiff in error before said Supreme Court, have been granted and considered by that court, it would have been properly presented in the record; but the court refused to grant such rehearing, as shown on page 71 of the record. For these reasons, no reference whatever has been made to such matters in the argument of this case, as we considered them foreign to the merits of the case now before this court.

For the reasons herein assigned, we respectfully submit that said decisions of said courts of Oklahoma are erroneous, and that the same should be reversed and remanded to said courts with the instructions to enter up a judgment in favor of the plaintiff in error and against the defendant in error, Henry C. Arnold, together with her proper costs herein expended.

Respectfully submitted,

LEWIS C. LAWSON,
Counsel for Plaintiff in Error.

Holdenville, Okla., July 14, 1914.

Although the laws of Arkansas were put in force in the Indian Territory by different acts of Congress, they were not adopted as unrelated but as parts of a single system of laws, whose relative operation, as determined by the Supreme Court of Arkansas, had become an integral part of them.

The Supreme Court of Arkansas having held prior to the acts of Congress putting either section in force in the Indian Territory that § 4621, Mansfield's Digest was a later enactment than § 648 and superseded it so far as they were in conflict, Congress must have intended that those sections should be so regarded in the Indian Territory, although § 648 was part of a chapter put in force by the later act of Congress.

32 Oklahoma, 167, affirmed.

THE facts, which involve the construction of statutes relating to Creek Indian allotments and the laws of descent applicable thereto, are stated in the opinion.

Mr. Lewis C. Lawson for plaintiff in error:

The deed to Arnold was null and void, because, under the allegations in her said answers and cross complaints, it was not made, executed or delivered to said Arnold; plaintiff in error never received any consideration therefor, or for said lands therein described; she at that time was in possession of said lands and ever thereafter retained such possession and claimed said lands as her own in fee simple.

The deed bears date the fifteenth of January, 1907, and said lands were allotted to the plaintiff in error under an Act of Congress known as the Original Creek Agreement, which put in force in the Indian Territory the Creek laws of descent and distribution of said Creek Nation; and the lands, being thus inherited by plaintiff in error from her deceased daughter, were restricted in her hands under that act, especially § 7 thereof and under § 16 of the Supplemental Creek Agreement, which became effectual on August 7, 1902; the deed was therefore null and void when so made, because of such Acts of Congress.

The deed was absolutely null and void for the further reason that the same was not made or executed in the way and manner provided for in chapter 27, Statutes of Arkansas of 1884, and especially as therein provided for in §§ 648 and 659, which chapter was put in force under an Act of Congress of February 19, 1903, the legal effect and consequence of which was discussed and considered in the opinion of said Supreme Court and by which plaintiff in error was denied her right, title and interest in the lands.

No appearance or brief filed for defendants in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit to foreclose a mortgage upon real property, 80 acres of which was part of a Creek allotment. The allotment was made on behalf of Otheola Adkins after her death, which occurred in her infancy. Her mother was a Creek woman, duly enrolled as such, but her father was not a Creek citizen. The date of the allotment is not given, but it is conceded that the allotment passed a life estate or more to the mother and nothing to the father. After the allotment was completed and the usual tribal deed issued, the father and mother joined in executing and delivering a deed for the 80 acres to one Arnold, who in turn mortgaged it to the plaintiff. The mother was made a defendant to the suit and by her answer set up two defenses requiring notice here. One was to the effect that the deed to Arnold was made in violation of restrictions imposed by Congress upon the right to alienate the land, and therefore was void; and the other was to the effect that the deed did not satisfy the requirements of a law of Arkansas put in force in the Indian Territory by Congress, and therefore did not affect or pass her title. Upon a demurrer to the answer, which set forth the deed and the certificate of its ac-

knowledgment, these defenses were held not well taken and there was a judgment for the plaintiff. The judgment was affirmed by the Supreme Court of the State. 32 Oklahoma, 167.

Other rulings than those just mentioned were made in the cause, but they need not be noticed, for no Federal question was involved in them.

The claim that the deed to Arnold was made in violation of existing restrictions rests upon the assumption that § 16 of the act of June 30, 1902, c. 1323, 32 Stat. 500, imposed restrictions upon the alienation of all Creek allotments. That this is an erroneous assumption is shown in *Skelton* v. *Dill, ante,* p. 206. Only allotments to living members in their own right were subjected to restrictions. Allotments on behalf of deceased members were left unrestricted. Thus the mother was at liberty to make a sale of her interest to Arnold if she chose.

A right appreciation of the claim respecting the insufficiency of the deed involves a consideration of the acts of Congress adopting and extending over the Indian Territory certain statutes of Arkansas. The act of May 2, 1890, c. 182, 26 Stat. 81, § 31, put in force, until Congress should otherwise provide, several general laws of Arkansas appearing in Mansfield's Digest of 1884, among them being chapter 104 concerning the rights of married women. Section 4621 of this chapter reads as follows:

"The real and personal property of any *femme covert* in this State, acquired either before or after marriage, whether by gift, grant, inheritance, devise or otherwise, shall, so long as she may choose, be and remain her separate estate and property, and may be devised, bequeathed or conveyed by her the same as if she were a *femme sole;* and the same shall not be subject to the debts of her husband."

The act of February 19, 1903, c. 707, 32 Stat. 841, put in force chapter 27 of Mansfield's Digest of 1884 concern-

ing conveyances of real estate, in so far as it was applicable and not inconsistent with any law of Congress. Section 648 of this chapter declares:

"A married woman may convey her real estate or any part thereof by deed of conveyance, executed by herself and her husband, and acknowledged and certified in the manner hereinafter prescribed."

The deed to Arnold, if tested by § 4621 and the applicable decisions of the Supreme Court of Arkansas, was sufficient to pass the mother's title, but if tested by § 648, it probably was insufficient, because not acknowledged and certified in the manner contemplated by that section.

It is insisted that § 648 is inconsistent with § 4621 and should be treated as controlling because its adoption by Congress was the later in time. Assuming that the two sections are inconsistent as claimed, we think § 4621 is controlling. While both were embodied in the Arkansas compilation known as Mansfield's Digest of 1884, § 4621 was a later enactment than § 648 and superseded the latter in so far as they were in conflict. This was settled by the Supreme Court of the State before either section was put in force in the Indian Territory (*Bryan* v. *Winburn*, 43 Arkansas, 28; *Stone* v. *Stone*, *Id.* 160; *Criscoe* v. *Hambrick*, 47 Arkansas, 235), and we think Congress intended they should have the same force and meaning there that they had in Arkansas. See *Robinson* v. *Belt*, 187 U. S. 41, 47–48. Although put in force in the Indian Territory by different acts, they were not adopted as if they were unrelated but as parts of a single system of laws whose relative operation, as determined by the Supreme Court of Arkansas, had become an integral part of them. *Pennock* v. *Dialogue*, 2 Pet. 1, 18; *Cathcart* v. *Robinson*, 5 Pet. 264, 280. It was upon this theory that the Supreme Court of Oklahoma held the mother's deed sufficient.

Judgment affirmed.

ADKINS *v.* ARNOLD.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 52. Submitted November 5, 1914.—Decided December 14, 1914.

Under § 16 of the Creek Indian Allotment Act of June 30, 1902, c. 1323, 32 Stat. 500, only allotments to living members of the tribe in their own right were subjected to restrictions upon alienation. Allotments on behalf of deceased members were left unrestricted. *Skelton* v. *Dill*, *ante*, p. 206.

In putting the laws of Arkansas in force in the Indian Territory by the acts of May 2, 1890, and February 19, 1903, Congress intended that those laws should have the same force and meaning that they had in Arkansas, and that they should be construed as they had theretofore been interpreted by the Supreme Court of that State. *Robinson* v. *Belt*, 187 U. S. 41.